No. 92-69

Supreme Court, U.S.
FILED
JUL 8 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ICELEAN CLARK, *et al.*,
Petitioners,

vs.

KALIMA JENKINS, *et al.*,
Respondents,

vs.

THE STATE OF MISSOURI, *et al.*,
Respondents,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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July 8, 1992

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81

QUESTIONS PRESENTED

In 1987, the federal trial court ordered an unprecedented doubling of a school property tax levy to help fund the most expensive court-ordered desegregation program in the United States. An appeals court affirmed, but modified, the judicial taxation scheme. In 1990, this Court affirmed the modified scheme but reversed the trial court's direct levy and remanded. Taxpayers then intervened, seeking the refund of all court-ordered property taxes collected in 1987 and 1988. The trial court granted refunds totalling $10,695,197 to taxpayers who paid the 1987 court-ordered increase "under protest" pursuant to a state taxation statute, but denied refunds totalling $23,140,758 to taxpayers who did not pay this judicial levy "under protest." The court also denied refunds totalling $34,313,185 to all taxpayers who paid the court-ordered increase in 1988. The appeals court affirmed.

The questions presented are these:

1. Did the lower courts misapply *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 110 S.Ct. 2238 (1990) and violate the due process rights of taxpayers when they refused to refund *all* property taxes collected as a result of a *sui generis* federal judicial levy reversed by this Court in *Missouri v. Jenkins,* 495 U.S. 33, 110 S.Ct. 1651(1990)?

2. Did the lower courts misinterpret the 1990 directive of this Court in *Missouri v. Jenkins* when they refused to refund the property tax increase directly levied by the federal trial court in 1988?*

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* Just months after this Court's affirmance of the modified scheme, the trial court entered a stipulated order again increasing the school property tax without a vote. That order is still on appeal. Review of this order would present the additional question: Did the lower courts misinterpret this Court's 1990 *Jenkins* holding when they sanctioned an indirect judicial tax increase as a *first* step for additional desegregation funding?

LIST OF PARTIES AND RULE 29.1 LIST

Petitioners are Icelean Clark, Bobby Anderton, Eleanor Graham, John C. Howard, Craig Martin, Gay D. Williams, Kansas City Mantel & Tile Co., Coulas and Griffin Insurance Agency, Inc., Lucille Trimble, Berlau Paper House, Inc. and Andrew J. Winningham. These Petitioners are individual and corporate taxpayers who own property within the Kansas City, Missouri School District. Some of these Petitioners paid their 1987 and 1988 property taxes under protest; some did not. Kansas City Mantel & Tile Co., Coulas & Griffin Insurance Agency, Inc., and Berlau Paper House, Inc. are Missouri corporations with no parent companies, subsidiaries or affiliates as contemplated by Rule 29.1.

Respondents representing the plaintiff class of schoolchildren below are Kalima Jenkins, by her next friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, Barbara Pugh; and Cynthia Winters, by her next friend, David Winters.

The American Federation of Teachers, Local 691 is an intervenor in the District Court proceedings and was a joint appellee.

Respondents representing the State defendants in addition to the State itself are the Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; the Missouri State Board of Education; Roseann Bentley, Dan L. Blackwell, Raymond McCallister, Jr., Susan D. Finke, Thomas R. Davis, Cynthia B. Thompson, Gary D. Cunningham, and Rebecca M. Cook, Members of the Missouri

State Board of Education; and Robert E. Bartman, Commissioner of Education of the State of Missouri.

A named party below in addition to Respondent School District of Kansas City, Missouri is Claude C. Perkins, Superintendent.**

** The listings of State Respondents and School District Respondents are as denominated in the Court of Appeals. The present Superintendent of the School District of Kansas City, Missouri is Walter L. Marks. According to the official state manual, the current members of the Missouri State Board of Education are Bentley, McCallister, Finke, Davis, Cunningham, Cook and Sharon M. Williams. There is one vacancy.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
The Judicial Taxation Decree	3
Modification and Its Aftermath	4
The Supreme Court Reversal	6
The Quest for Refunds	7
REASONS FOR GRANTING THE WRIT	8
I. THE LOWER COURTS' REFUSAL TO ORDER FULL REFUNDS OF ALL COURT-ORDERED PROPERTY TAXES MISAPPLIED THIS COURT'S *MCKESSON* PRECEDENT AND VIOLATED TAXPAYERS' DUE PROCESS RIGHTS ON AN IMPORTANT QUESTION OF FEDERAL LAW THAT MUST BE SETTLED BY THIS COURT	9

A. Missouri's "Protest" Statute Does Not Apply To The Refund Of Unlawful Taxes Paid As The Result Of A Federal Judicial Taxation Decree And This Court's *McKesson* Decision Does Not So Hold ... 11

B. The Fundamental Principles Of Due Process Espoused In *McKesson* Mandate A Full Refund Of All Unlawful Taxes Directly Imposed By A Federal Court 14

II. THE LOWER COURTS' REFUSAL TO ORDER FULL REFUNDS OF 1988 COURT-ORDERED PROPERTY TAXES MISINTERPRETED THIS COURT'S *JENKINS II* DECISION 17

A. The $1.95 Levy Increase Actually Paid By Taxpayers In 1988 Resulted From The District Court's September 15, 1987 Taxation Decree And Not From A Levy Increase Timely Adopted By The Kansas City School Board And Approved By The District Court In Accordance With *Jenkins II* 18

B. The School Board's Actions In 1988 And 1989 Confirm That The 1988 Levy Increase Resulted From The District Court's September 15, 1987 Taxation Decree ... 21

CONCLUSION 23

APPENDIX A

April 10, 1992 Opinion of the United States Court of Appeals for the Eighth Circuit A-1

APPENDIX B
October 29, 1990 Order of the District Court A-12

APPENDIX C
September 13, 1989 Order of the District Court ... A-26

APPENDIX D
January 3,1989 Order of the District Court A-30

APPENDIX E
Minutes of the August 22, 1989 Meeting of the KCMSD Board of Directors (pages 1 & 8) A-38

APPENDIX F
Minutes of the October 11, 1988 Meeting of the KCMSD Board of Directors (pages 1 & 3) A-42

APPENDIX G
Minutes of the September 13, 1988 Meeting of the KCMSD Board of Directors (pages 1 & 4) A-46

TABLE OF AUTHORITIES

Page

Cases:

Adcor Realty v. State Tax Commission, 627 S.W.2d 604 (Mo. banc 1982) 12

Armstrong v. Manzo, 380 U.S. 545 (1965) 15

Atchison, T. & S.F.R. Co. v. Connor, 223 U.S. 280 (1912) 16

B & D Investment Co., Inc. v. Schneider, 646 S.W.2d 759 (Mo. banc 1983) 12

Boyd-Richardson Co. v. Leachman, 615 S.W.2d 46 (Mo. banc 1981) 12

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940) 9

Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985) 15

Hanke by Hanke v. Walters, 740 F.2d 654 (8th Cir. 1984) 15

Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988) .....*passim*

Jenkins v. State of Missouri, 672 F. Supp. 400 (W.D. Mo. 1987) 3,4

Lloyd v. Lawrence, 60 F.R.D. 116 (S.D. Tex. 1973) 20

Mathews v. Eldrige 424 U.S. 319 (1976) 14,15

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238 (1990) .....*passim*

Missouri v. Jenkins, 495 U.S. 33, 110 S.Ct. 1651 (1990) ..... *passim*

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 15

Norton v. Shelby County, 118 U.S. 425 (1886) 9

Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. en banc 1975) 20

Solem v. Stumes, 465 U.S. 638 (1984) 9

United States v. Estate of Donnelly, 397 U.S. 297 (1970) 9

Ward v. Board of County Commissioners, 253 U.S. 17 (1919) 17

Zinermon v. Burch, 110 S.Ct. 975 (1990) 15

Constitutional Provisions, Statutes and Rules:

U.S. Const. amend. V ..... *passim*

U. S. Const. amend. XIV 14

Mo. Rev. Stat. Section 139.031(1987 Supp.) (amended 1989) ..... *passim*

Other Authorities:

9 J. Moore, *Federal Practice* (2d ed. 1986) 20

R. Tresolini, *American Constitutional Law* (2d ed. 1965) 8

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review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-captioned matter on April 10, 1992.

OPINIONS BELOW

The April 10, 1992 opinion of the United States Court of Appeals for the Eighth Circuit (Appendix, A1 - A11) has not yet been reported. The October 29, 1990 order of the District Court (App., A12 - A25) is unpublished.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1992. No petition for rehearing or suggestion for rehearing *en banc* was filed. The jurisdiction of this Court to review the judgment and opinion of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. V provides in pertinent part:

[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This petition entails fundamental constitutional issues of judicial power, taxation and due process that have arisen once again in the Kansas City, Missouri School District ("KCMSD" or "district") desegregation lawsuit. In 1987 and 1988, district taxpayers paid a $1.95 property tax levy increase ordered by the

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[1] Two additional unpublished District Court orders from 1989 pertaining to the school property tax levy are reprinted in the Appendix (App., A26 & A30) for the convenience of the Court.

federal trial court[2] to fund the elaborate KCMSD desegregation program. This direct judicial levy was affirmed and modified by the Eighth Circuit Court of Appeals on August 19, 1988 in a decision which became effective October 14, 1988. The affirmance of the direct judicial levy was subsequently reversed by this Court in April of 1990. S me district taxpayers paid their 1987 and 1988 judicial tax increases "under protest" pursuant to a Missouri revenue statute dealing with state and local taxes. *See* footnotes 4 & 5, *infra*. Most did not.

Following this Court's reversal of the court-ordered levy, Petitioners[3] returned to the District Court seeking a full refund of all taxes paid as a result of the $1.95 levy increase in 1987 and 1988. The District Court, invoking jurisdiction under 28 U.S.C. Section 1331, granted Petitioners intervention but ordered refunds only of 1987 taxes paid "under protest." (App., A24.) The court denied refunds to taxpayers who did not pay the 1987 tax increase under protest and further denied refunds to all taxpayers who paid the 1988 tax increase. (*Id.*) Petitioners appealed to the Eighth Circuit, which affirmed the refund order.

The Judicial Taxation Decree

On September 15, 1987, the District Court entered its order approving an elaborate school district capital improvement plan in the massive and complex Kansas City school desegregation case. *See Jenkins v. State of Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987). The State of Missouri and the KCMSD were held to

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[2] United States District Court for the Western District of Missouri, the Honorable Russell G. Clark, Senior Judge.

[3] Petitioners are individuals and businesses who own real and personal property situated within the district. They paid the court-ordered taxes at issue; some did so "under protest" and some did not. Most of these taxpayers appeared as *amici* in the previous *Jenkins* appeal reviewed by this Court in No. 88-1150.

be jointly and severally liable for the capital program. The KCMSD's motion for funding relief was granted in part in that it was ordered:

> [T]hat in order to fund the obligation of the KCMSD for the desegregation program, a surtax of 1.5% is added to the Missouri State Income tax for all persons and entities receiving income for the work done, services rendered, and income received from activities within the KCMSD and the tax levy for the KCMSD is raised [from $2.05] to $4.00 per $100 assessed valuation.

Jenkins, 672 F. Supp. at 413. This $1.95 court-ordered levy increase was to be effective immediately for tax year 1987 *and was to continue through tax year 1991*.

This taxation decree was appealed to the Eighth Circuit. Pending appeal, property tax statements reflecting the District Court's new (and increased) levy were sent to KCMSD property taxpayers. Payment of these taxes was due by December 31, 1987. This direct judicial levy generated $33,835,955 in additional property tax revenues collected by Jackson County officials for the 1987 tax year.[4]

Modification and Its Aftermath

On August 19, 1988, the Eighth Circuit entered its decision which, *inter alia*, reversed the court-ordered income tax surcharge, but affirmed and modified the court-ordered $1.95 property tax levy increase. *See Jenkins v. Missouri*, 855 F.2d

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[4]Some 9,000 KCMSD taxpayers, including some Petitioners herein, paid a total of $10,695,197 of this levy increase "under protest," citing Mo. Rev. Stat. Section 139.031. *See* footnote 7, *infra*, for the text of this provision. These funds were held in escrow by Jackson County pending resolution of state court recovery actions filed by taxpayers in the Circuit Court of Jackson County, Missouri. Following the District Court's October 29, 1990 refund order (App., A12), these monies were refunded to district taxpayers.

1295 (8th Cir. 1988) ("*Jenkins II*"). The modification ordered that "*future* funding" of KCMSD desegregation liability be accomplished by the Kansas City school board submitting a "reasonable" levy to collection authorities "adequate to fund" its desegregation budget without a vote of the people, as otherwise required by state law, subject to limitations set by the District Court. *Jenkins II*, 855 F.2d at 1314 (emphasis added).

The school board voted on September 13, 1988 to authorize its legal counsel to file a motion for approval of a maximum property tax levy rate of $4.23 per $100 assessed valuation. The school board's recommendation was made "[s]ubject to the District Court's making such a ruling by October 11, 1988. . . . If no such ruling is forthcoming by October 11, 1988, the Board of Directors *anticipates* that at that time it will set the 1988-89 levy rate at $4.00 per $100.00 of assessed valuation, *pursuant to Judge Clark's September 15, 1987 ruling*." (App., A47 - A48) (emphasis added).)

The KCMSD then filed a motion for approval of a maximum property tax levy which requested the District Court's assent to a $4.23 levy for tax year 1988 (school fiscal year 1988-89), or, in the alternative, the District Court's approval of the $4.23 levy for tax year 1989 (school fiscal year 1989-90). The KCMSD also stated its intent to "submit to County tax collection authorities a 1988-89 levy rate of $4.00 pursuant to [the District Court's] September 15, 1987 Order" in the event the District Court did not rule on the motion by October 11, 1988.

The District Court could not rule on the motion by October 11, 1988 because the Eighth Circuit had not yet issued its mandate. Accordingly, the school board, on October 11, 1988, voted to leave the 1988 levy at $4.00 per $100.00 assessed valuation "pursuant to the September 15,1987 ruling. . . . " (App., A43.) Thereafter, property tax statements were sent to district taxpayers reflecting the same $4.00 levy (and $1.95 increase) levied by

the District Court the previous year. By the end of 1988, another $34,313,185 in additional property tax revenues were collected as a result of the judicial levy.[5]

The Eighth Circuit's mandate did not issue until October 14, 1988. It affirmed the $1.95 tax levy increase but remanded with directions that *future* funding of the KCMSD's portion of the desegregation liability — i.e., *future* property tax increases — be accomplished in conformance with the modification set forth in the appellate opinion.

Not until January 3, 1989 did the trial court deny the district's motion to set the 1988 maximum levy at $4.23. The court was "convinced that the property tax rate for 1988 should not be increased from $4.00 to $4.23." (App., A36.) Further, the court denied as premature the school district's request for approval of the $4.23 levy for tax year 1989. *(Id.)* In this order, the District Court also granted income tax surcharge taxpayers' motion for intervention and for a *full* refund of the $31 million in surcharge payments collected as a result of the September 15, 1987 taxation decree. (App., A30.)

The Supreme Court Reversal

On April 18, 1990, this Court issued its opinion in *Missouri v. Jenkins*, 495 U.S. 33, 110 S.Ct. 1651 (1990) ("*Jenkins II*"). This decision reversed the Eighth Circuit's affirmance of the direct judicial levy, *Jenkins II*, 110 S.Ct. at 1663, affirmed the modified scheme for future years, *id.* at 1666, and remanded "for further proceedings consistent with this opinion." *Id.* at 1667. This Court described the judicial imposition of a tax increase as "an

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[5] Another 10,000 taxpayers, including some Petitioners herein, paid $9,379,400 of the 1988 court-ordered taxes "under protest." These monies were held in escrow by county officials until the District Court's October 29, 1990 decision ordered their release to the State of Missouri for reimbursement of desegregation expenditures. (App., A24.)

extraordinary event" and concluded the District Court "abused its discretion in imposing the tax itself." *Id.* at 1663.

The Quest for Refunds

Taxpayers once again moved to intervene in the trial court for the purpose of obtaining tax refunds, this time the court-imposed property tax increases. Petitioners prayed for a full refund of all federal court-ordered tax increases paid in 1987 ($33,835,955) and in 1988 ($34,313,185), irrespective of whether such taxes had been paid pursuant to any state or local property tax protest mechanism.

On October 29,1990, the District Court entered a final order that granted taxpayers intervention and invalidated the 1987 levy increase, but authorized refunds for only those taxpayers who paid the 1987 levy increase "under protest." (App., A24.)[6] The court upheld the validity of the 1988 levy increase and, in doing so, denied refunds for all 1988 taxpayers. (*Id.*) The Court of Appeals affirmed this refund order. (App., A3.)

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[6] Upon a request for reconsideration, the District Court turned over the administration of the refund process to the state court presiding over the recovery actions. *See* footnotes 4 & 5, *supra*. The administration of refunds for taxes paid "under protest" in 1987 is substantially complete.

REASONS FOR GRANTING THE WRIT

At stake in this controversy is the credibility of the federal judiciary and the responsibility to correct abuses of judicial power. At the core of this petition is the plea of taxpayers for fundamental fairness and due process of law.

One commentator has noted that "judicial self-restraint and judicial power seem to be the opposite sides of the same coin: it has been by judicious application of the former that the latter has been maintained. . . . [Judicial power] has been maintained by a wise refusal to employ it in unequal combat." R. Tresolini, *American Constitutional Law 65* (2d ed. 1965). The lower courts' refusal to refund *all* taxes unlawfully levied by a federal court constitutes "unequal combat." It's not fair, and it contaminates the moral authority of the judicial branch of government.

Taxpayers in Kansas City grudgingly paid an unprecedented and dubious judicially imposed property tax levy — the first and only such levy in the history of the United States. They paid this "tax" out of deference to our system of justice. This Court then struck down this judicial levy as an "extraordinary event" and an abuse of discretion. But now the lower courts have ruled that, despite the *sui generis* nature of this levy, taxpayers' due process right to the return of their property is somehow yoked to their compliance with an arcane Missouri taxation and revenue statute's "protest" requirements. Of course, no government entity — not the courts, not the parties, not the local taxing authorities, *no one*—provided taxpayers with fair notice of this "protest" prerequisite.

The beneficiaries of this ruling are the joint and several tortfeasors in this case (who now use these ill-gotten gains to pay their desegregation obligations) *and* corporate and individual taxpayers wealthy and sophisticated enough to utilize tax and legal experts in following these arcane state law procedures. The victims of this ruling are average, often low-income, taxpayers

who didn't know where to turn when a federal judge doubled their property taxes. Imagine the hue and cry that would arise if a federal court unlawfully deprived low-income families of government assistance benefits and then, after reversal on appeal, refused to reinstate back benefits because those recipients had failed to follow a maze of bureaucratic obstacles printed in the Federal Register. Kansas City taxpayers have suffered a similar injustice.

This Court has never confronted the due process implications of refunding a federal judicial levy. This is an important question of federal law which should be settled by this Court. The lower courts' decisions misapplied this Court's refund precedent in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238 (1990), and misinterpreted, or ignored, key findings in this Court's 1990 decision in *Jenkins II*. The nature and scope of this court-imposed levy, and the lawful refund of an unlawful judicial tax, raise significant Article III and Fifth Amendment questions. A just resolution of the questions presented will counsel taxpayers and courts throughout the country.

I.

THE LOWER COURTS' REFUSAL TO ORDER FULL REFUNDS OF ALL COURT-ORDERED PROPERTY TAXES MISAPPLIED THIS COURT'S *MCKESSON* PRECEDENT AND VIOLATED TAXPAYERS' DUE PROCESS RIGHTS ON AN IMPORTANT QUESTION OF FEDERAL LAW THAT MUST BE SETTLED BY THIS COURT.

Individuals and businesses forced to pay an unlawful tax against their will are entitled to a full refund. *See generally Solem v. Stumes*, 465 U.S. 638 (1984); *United States v. Estate of Donnelly*, 397 U.S. 297 (1970); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Norton v. Shelby*

County, 118 U.S. 425 (1886). This is settled law. This rule especially should apply where taxes are unlawfully levied by a federal court. However, because no federal court has ever before directly levied a tax, this important question of federal law has not been settled by this Court. It should be.

In an effort to make themselves whole again, taxpayers returned to the District Court immediately following this Court's reversal of the September 15, 1987 judicially imposed property tax increase. They requested a full refund of all court-ordered tax payments for 1987 and 1988. Misapplying *McKesson, supra*, the lower courts concluded that a state may limit the circumstances under which it will be required to provide refunds and ordered the refund of only those 1987 tax payments paid under a Missouri tax protest statute. (App., A17 & A8.)

Petitioners had contended that the Missouri protest law applied only to protests of state and local taxes imposed by state and local taxing authorities and *not* to a *sui generis* judicial tax. We pointed out that, in *this* instance, the federal trial court was the *de facto* taxing authority and no one — not the court or any party — notified taxpayers of any protest prerequisite for obtaining a refund of a judicial levy if the levy were subsequently reversed. Nevertheless, the lower courts, citing no apposite authority, held "the plain language of the statute allows protests of 'any taxes', therefore the Missouri protest statute controls this case." (App., A18 & A7.)

A. Missouri's "Protest" Statute Does Not Apply To The Refund Of Unlawful Taxes Paid As The Result Of A Federal Judicial Taxation Decree And This Court's *McKesson* Decision Does Not So Hold.

Section 139.031 of the Revised Statutes of Missouri[7] sets forth a protest, escrow and refund procedure concerning the payment and collection of state and local real, personal and merchants' taxes. The law begins by providing that "[a]ny taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the director of revenue of Missouri." Mo. Rev. Stat. Section 139.031.1. The statute goes on to require the county collector to impound protested taxes, assuming the taxpayer perfects his or her protest with the filing of a tax recovery lawsuit in state circuit court. Section 139.031.2. Some KCMSD property taxpayers protested the disputed $1.95 court-ordered levy when they paid their taxes. Most, because of a lack of notice or the financial wherewithal to hire a lawyer, did not.

Although this protest requirement has been universally confined to taxpayer challenges to allegedly unlawful property tax

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[7] Mo. Rev. Stat. Sections 139.031.1 & .2 (1987 Supp.) (amended 1989) provide in part:

> 1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the director of revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based. . . .
>
> 2. The collector shall disburse to the proper official all portions of taxes not disputed by the taxpayer and shall impound in a separate fund all portions of such taxes which are in dispute. Except as provided in subsection 3 of this section, every taxpayer protesting the payment of taxes shall, within ninety days after filing his protest, commence an action against the collector by filing a petition for the recovery of the amount protested in the circuit court of the county in which the collector maintains his office. . . .

assessments or classifications by state authorities and local political subdivisions,[8] the lower courts concluded that the "plain language of the statute allows protests of 'any taxes'," and is applicable even where "the taxes were assessed by a federal court." (App., A18 & A7.) But the issue is not whether this statute, in these extraordinary circumstances, *allows* the impoundment of a judicial property tax. The question is whether, consistent with the Due Process Clause of the Fifth Amendment, compliance with the state protest prerequisites are *required* before an unlawful federal judicial levy can be returned. Compliance is not mandated and *McKesson* does not say that it is.

Moreover, Section 139.031 does not apply to any and all taxes. It applies only to taxes imposed by the State of Missouri, and even then exempts state income taxes. It does not apply to federal income taxes, excise taxes, or *any* other type of tax imposed by the federal government. And it does not apply to the $1.95 levy increase invalidated by this Court that was not itself a lawful "tax."

The District Court, relying on *McKesson*, concluded that "as long as the state has made a protest procedure available, there is no constitutional right to a refund of unlawfully collected taxes. . . . A state has the power to limit the circumstances under which it will be required to provide refunds." (App., A17.) This again confuses the issue. The protest procedure established in Section 139.031 pertains to the State of Missouri's duties and limitations in refunding unlawfully collected taxes assessed by the state itself or by its political subdivisions. It does not limit the federal government's duty to follow basic due process and just compensation principles where the federal government — here, the judiciary — is responsible for the unlawful taking of property —

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[8] *E.g., B & D Investment Co., Inc. v. Schneider*, 646 S.W.2d 759 (Mo. banc 1983); *Adcor Realty v. State Tax Commission*, 627 S.W.2d 604 (Mo. banc 1982); *Boyd-Richardson Co. v. Leachman*, 615 S.W.2d 46 (Mo. banc 1981).

in this case, through a judicial levy. In this case, the State of Missouri's ultimate financial responsibility for reimbursing taxpayers, if any, would derive from its status as a joint and several tortfeasor responsible for KCMSD desegregation obligations who benefited from the unlawful tax windfall and not as the repository responsible for returning an unlawfully collected state or local tax contemplated by Section 139.031.

The Court of Appeals, again relying on *McKesson*, concluded that it did not "see the origin of the levy as the critical issue.... The district court did not purport to be creating a new type of tax, but merely augmenting the existing KCMSD property tax." (App., A7.) The levy increase, while ordered by the trial court, was simply "an ordinary state property tax." (*Id.*)

However, the four members of this Court who concurred in *Jenkins II* understood well the significance of the origin of the $1.95 levy increase and any indirect judicial levy ordered pursuant to the modified scheme. These Justices pointed out that "[i]t is plain that the KCMSD had no . . . power under state law [to increase its tax levy without voter consent]. That being so, the authority to levy a higher tax would have to come from the federal court." *Jenkins II*, 110 S.Ct. at 1675 (Kennedy, J., concurring). In other words, the concurrence concluded the District Court's grant of authority amounted to far more than the mere "augmentation" of a state or local tax: "Local government bodies in Missouri, as elsewhere, must derive their power from a sovereign, and that sovereign is the State of Missouri. . . . Whatever taxing power the KCMSD may exercise outside the boundaries of state law would derive from the federal court...." *Id.* at 1670. The concurrence went on to state that "[a]bsent a change in state law" any such tax directly or indirectly levied would be "imposed by federal authority under a federal decree." *Id.*

Unlike *McKesson*, where a state legislature unlawfully assessed a state tax, this case involves an unlawful *sui generis* tax

levied by a federal court that has resulted in the unlawful seizure of property by the federal judiciary. It is the federal government, in particular the federal judiciary, that should follow due process and establish a refund procedure, not the State of Missouri.

B. The Fundamental Principles Of Due Process Espoused In *McKesson* Mandate A Full Refund Of All Unlawful Taxes Directly Imposed By A Federal Court.

The lower courts mix apples with oranges and turn due process on its head when they try to use *McKesson* as support for invoking Section 139.031's state and local tax protest procedures as a prerequisite for challenging a federal court's property tax levy. Where a state fails to establish a predeprivation procedure to safeguard due process regarding the exaction of a state tax, the state must provide some form of retrospective relief as part of a postdeprivation procedure. Here, the District Court's unexpected doubling of the local property tax constituted the unlawful deprivation and this, too, should have been rectified by a refund procedure established by the court that provides "meaningful backward-looking relief." 110 S.Ct. at 2247. But the District Court did not notify taxpayers of any procedural requirements for seeking the return of these unlawfully collected taxes. The significance of *McKesson* here is its steadfast affirmance of fair and meaningful due process notice in postdeprivation relief procedures. These principles were not followed by the lower courts.

The traditional due process analysis employed in *McKesson* begins with the proposition that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldrige*, 424 U.S. 319, 332 (1976). *See* U.S. Const. amend. V and amend. XIV. The fundamental requirement

of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* at 333 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). *See Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 547 (1985).

An equally fundamental requirement of due process is that notice must be given to individuals whose interests are at stake in a governmental proceeding or action. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* What constitutes a "meaningful" opportunity to be heard is flexible, depending on the procedural protections demanded by particular situations. *Mathews v. Eldrige*, 424 U.S. at 334-35. *See Zinermon v. Burch*, 110 S.Ct. 975, 984 (1990); *Hanke by Hanke v. Walters*, 740 F.2d 654, 656 (8th Cir. 1984).

Employing this analysis, this Court found that the taxpayer's due process rights in *McKesson* had been violated and that it was entitled to retrospective relief. In *McKesson*, the State of Florida did not provide taxpayers with an opportunity to withhold payment of taxes and to obtain a predeprivation determination of a state tax assessment's validity. 110 S.Ct. at 2251. Accordingly, payment of the tax in order to avoid financial sanctions or a seizure of real or personal property was made under "duress" in the sense that the state had not provided a fair and meaningful predeprivation procedure. *Id.* n.21 (citations omitted). In order to satisfy the requirements of the Due Process Clause under these circumstances:

> [T]he State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy" . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

Id. at 2251 (citation omitted). See *Atchison, T. & S.F.R. Co. v. Connor*, 223 U.S. 280, 285 (1912).

The state liquor tax was invalidated in *McKesson* because of its discriminatory nature, not because it was beyond the state's power to impose. As such, this Court sanctioned remedies falling short of complete refund of the unlawful tax. The Court noted that had the Florida courts declared the *McKesson* tax invalid because it was beyond the state's power to impose, "[t]he State would have had no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress." *Id.* Otherwise, collecting the unlawful tax by coercive means without incurring any obligation to pay them back should they be found unlawful "would be in contravention of" due process. *Id.*

The clear import of *McKesson* is that where a federal court unlawfully assumes the authority to levy and collect a tax, *the federal court* must provide taxpayers with notice and a meaningful opportunity to protest the tax and protect their right to a refund in order to satisfy the Fifth Amendment. Due process concerns also were a cornerstone of Justice Kennedy's concurring opinion in *Jenkins II*. "[A] district court order that overrides the citizens' state law protection against taxation without referendum approval can in no sense provide representational due process." *Jenkins II*, 110 S.Ct. at 1671 (Kennedy, J., concurring). Unlike taxation by a legislature where "[t]he citizens who are taxed are given notice and a hearing through their representatives, whose power is a direct manifestation of the citizens' consent," *id.*, and unlike the extraction of money by a court's judgment where "the adjudication itself provides the notice and opportunity to be heard . . . ," *id.*, the District Court's taxation decree and levy provided no safeguards for KCMSD taxpayers who have never been full parties to the desegregation litigation.

The lower courts, in effect, have ruled that taxpayers' confusion as to how to respond to the only federal judicial tax ever

levied is no excuse. The Court of Appeals further found that Landmark Legal Foundation's attempt to publicize the potential availability of an impoundment vehicle somehow relieved the District Court of its due process obligations. (App., A9.) It did not. It is the federal court — not the State of Missouri and certainly not a small public interest law firm — that must satisfy taxpayers' due process rights by ensuring that *all* taxpayers are provided meaningful retrospective relief.

The failure of a federal court to satisfy these due process requirements would allow it to levy an unlawful tax and have it collected by coercive means without incurring any obligation to require repayment once it is found unlawful. Such a result is in contravention of the Fifth Amendment and should not be sanctioned. *See Ward v. Board of County Commissioners*, 253 U.S. 17, 24 (1919) ("[T]he obligation to do justice . . . will compel restitution or compensation.").

Those least able to afford the court-ordered tax increase typically were not able to effect a valid protest. Many poor, elderly and small business taxpayers — taxpayers who do not have at the ready a fully-staffed corporate legal department — have suffered from what this Court found to be an abuse of judicial power. The credibility of the federal court system depends on these people's faith being restored, and that will only result when justice is done and a *full* refund is ordered for *all* taxpayers.

II.

THE LOWER COURTS' REFUSAL TO ORDER FULL REFUNDS OF 1988 COURT-ORDERED PROPERTY TAXES MISINTERPRETED THIS COURT'S *JENKINS II* DECISION.

Everyone has agreed that the $1.95 tax increase collected in 1987 resulted from the District Court's September 15, 1987

decree. However, the lower courts concluded that the school district set the 1988 levy itself on October 11, 1988 — even though the Eighth Circuit's mandate did not issue until October 14,1988 and even though the District Court did not approve or reject *any* 1988 KCMSD property tax levy until January 3, 1989, a date subsequent to the collection of 1988 taxes. (App., A20 & A10.) The lower courts ruled the 1988 tax increase was "collected lawfully in accordance with the Eighth Circuit's modified procedure" (App., A21) and denied Petitioners' request for a refund of protested and unprotested increased property taxes collected in 1988.

A. The $1.95 Levy Increase Actually Paid By Taxpayers In 1988 Resulted From The District Court's September 15, 1987 Taxation Decree And Not From A Levy Increase Timely Adopted By The Kansas City School Board And Approved By The District Court In Accordance With *Jenkins II*.

It is imperative to note that, on appeal, the Eighth Circuit *affirmed* the $1.95 property tax levy increase ordered by the District Court in 1987. In its August 19, 1988 decision, the Court of Appeals approved the order and conclusions of the District Court "with respect to the property tax" but modified "its *future* operation to more closely comport with limitations upon [the court's] judicial authority." *Jenkins II*, 855 F.2d at 1299 (emphasis added). Therefore, the Court of Appeals believed the increase of the KCMSD levy from $2.05 to $4.00 reflected the District Court's actions "taken to this point" that were being "affirm[ed]" on appeal. *Id.* at 1314.

The Eighth Circuit instructed that *future* funding of KCMSD's obligations under the desegregation plan be modified. Future levies were to be set by the Kansas City school board — subject to the approval of the District Court — and submitted to collection authorities. The District Court would then enjoin the opera-

tion of Missouri constitutional and statutory limitations that would otherwise lower or reduce the levy below the amount submitted by the school board. *Id.*

This Court then found that it was not until *after* the 1988 levy was set, billed and paid that the modified system was implemented by the school board and the District Court. *See Jenkins II,* 110 S.Ct. at 1664 n.18. The Court concluded that the $1.95 property tax increase ordered by the District Court in 1987, and now invalidated, had been in effect "through fiscal year 1988-89." *Id.* The Court determined that the reversed judicial "tax increase" had been "imposed" by the District Court "for prior [school] fiscal years" 1987-88 and 1988-89. *Id.* This Court further determined that the District Court's January 3,1989 "direction" to the KCMSD concerning the 1989 levy (for fiscal year 1989-90), "indicate[d] that the District Court understood that it was *now* obliged to allow KCMSD to set the tax levy itself" *Id.* (emphasis added).[9]

The concurring Justices went even further, concluding that the District Court's January 3, 1989 order "left in effect the $4.00 rate [the District Court] had established in its October 27, 1987

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[9] Even the District Court's statements support this conclusion. In its September 13, 1989 order approving the Kansas City school board's motion to set the 1989 levy at $4.00, the court conceded it was doing so because "[t]he parties believe[d] that it would be appropriate *to continue the $4.00 tax levy rate adopted pursuant to the [District] Court's September 15, 1987, and January 3, 1989, orders in light of the United States Supreme Court's granting of certiorari* on the question of whether the [District] Court has authority to impose a property tax increase on citizens of a local school district to remedy past constitutional wrongdoings." (App., A27 (emphasis added).) The District Court's January 3, 1989 and September 13, 1989 orders analyzing the KCMSD levy and the modified taxation scheme are set forth in the Appendix (App., A30 & A26).

order.''[10] *Id.* at 1669. The concurrence found that the District Court "thought it was under no compulsion to disturb its existing order establishing the $4.00 property tax rate through fiscal year 1991-92 unless and until it became necessary to *raise* property taxes even higher." *Id.* (emphasis in original).

The Eighth Circuit's mandate was issued on October 14, 1988. The District Court had no jurisdiction to implement the modification set forth in the mandate prior to that date. *See Reserve Mining Co. v. EPA*, 514 F.2d 492, 541 (8th Cir. en banc 1975) ("Until we issue our mandate, the district court lacks jurisdiction...."). Only by issuance of a mandate — and not upon the issuance of an opinion — does jurisdiction over issues on appeal revert back to the lower court. *See Lloyd v. Lawrence*, 60 F.R.D. 116, 118 (S.D. Tex. 1973). *See also* 9 J. Moore, *Federal Practice* Section 203.11 at 3-44 to 3-47 (2d ed. 1986).

The trial court, therefore, had no jurisdiction to implement the modification mandated by the Eighth Circuit, and approve the school board's proposed 1988 levy increase, until October 14, 1988. In any event, the District Court did not implement the modification until nearly one full year later when, in its September 13, 1989 order, it approved the 1989 levy set by the Kansas City school board "pursuant to the August 19, 1988 opinion of the Eighth Circuit Court. . . ." (App., A39.)

This Court's majority opinion in *Jenkins II* was careful to note the chronology following the issuance of the Eighth Circuit's mandate: "The Court of Appeals required the District Court to use the less obtrusive procedures beginning with the fiscal year commencing after the remand but did not require the District Court to reverse the tax increase that it had imposed for prior fiscal *years*." *Jenkins II*, 110 S.Ct. at 1664 n.18 (emphasis

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[10] The District Court's September 15, 1987 order was amended by an October 27, 1987 order concerning matters not relevant to this discussion.

added). The majority further observed that the District Court's January 3, 1989 order concerning the anticipated 1989 levy demonstrated the District Court's understanding that it was only then obliged to allow the KCMSD to set the tax itself. *Id.* The District Court's September 13, 1989 order, approving the school board's August 22, 1989 vote adopting the $4.00 levy, confirmed that understanding.

The lower courts' decisions virtually ignore this Court's interpretation of the modification process. The District Court conceded that Petitioners were "technically correct" in asserting that the trial court did not have jurisdiction to timely implement the modification to effect the 1988 levy. (App., A19.) However, the court concluded that the proper focus was on "what action the KCMSD took." (*Id.*) This is an important 'technicality' for the KCMSD alone could not set this levy; the District Court had to approve it. The trial court did not approve it before the 1988 taxes were levied and paid.

The District Court and the KCMSD cannot have it both ways. They cannot assert that the KCMSD had adopted a $4.00 levy for 1988 as "reasonable and necessary" under the Eighth Circuit modification *at the same time* it was seeking District Court approval of a $4.23 levy as "reasonable and necessary" to pay for desegregation expenses. Despite these inconsistencies and this Court's view of the procedural activity below, the lower courts have been satisfied to simply state that somehow, perhaps telepathically, the District Court and the KCMSD "understood who must set the levy for 1988." (App., A20 - A21.)

B. The School Board's Actions In 1988 And 1989 Confirm That The 1988 Levy Increase Resulted From The District Court's September 15, 1987 Taxation Decree.

At its September 13, 1988 meeting, the school board voted to seek from the District Court approval of a cap on the district's

property tax levy of no more than $4.23 per $100 of assessed valuation "pursuant to the August 19, 1988 opinion of the Eighth Circuit Court of Appeals." (App., A47.) If the District Court did not rule on the KCMSD's motion by October 11,1988, the board anticipated that it would seek approval of the rate of $4.00 per $100 of assessed valuation "pursuant to Judge Clark's September 15, 1987 ruling." (App., A48.) The board's action here concedes that the $.23 increase is the board's new levy requiring District Court approval, while the $4.00 levy — with the $1.95 increase — was established by "Judge Clark's September 15, 1987 ruling" and, therefore, did *not* require trial court approval under the Eighth Circuit's modification. This is consistent with the conclusion drawn by the concurring Justices in *Jenkins II*. *See* 110 S.Ct. at 1669.

Of course, the District Court did not — and could not — rule on the levy increase request by October 11, 1988. The board voted at its October 11, 1988 meeting to set the property tax levy at $4.00 per $100 of assessed valuation "pursuant to the September 15, 1987 [District Court] ruling. . . ." (App., A43.) The Eighth Circuit's mandate did not issue until October 14, 1988. The District Court did not act until January 3, 1989 when it *rejected* the $.23 levy increase requested by the KCMSD. Therefore, *the property tax bills that went out in the fall of 1988, and that were paid by December 31, 1988, included the same $1.95 court-ordered levy imposed by the District Court in 1987, affirmed by the Eighth Circuit in 1988, but later reversed by this Court in 1990.*

The board's action in 1989 further confirms this assessment of the situation in 1988. In 1989, the board acted on the authority of the Eighth Circuit's modification permitting the board to set the entire levy. The board voted on August 22, 1989 to seek a cap on the district's 1989 tax levy of $4.00 "pursuant to the August 19, 1988 opinion of the Eighth Circuit Court . . . " (App., A39) in a timely manner *before* the 1989 tax bills were sent out and paid.

In 1989, the board actually set the levy pursuant to the Eighth Circuit's modification and not the District Court's September 15, 1987 taxation decree.

The Supreme Court's clear interpretation of the effective date for the constitutionally acceptable modified tax scheme is tax year 1989. KCMSD taxpayers are entitled to full refunds of the property tax payments made in compliance with the court-ordered $1.95 levy imposed in 1987 *and* 1988. The lower courts' decisions conflict with *Jenkins II* on this important question and this Court should rectify this error.

CONCLUSION

This Honorable Court should issue its writ of certiorari to review the special and important questions presented.

Respectfully submitted,

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July 8, 1992

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2977

Kalima Jenkins, by her next friend, Kamau Agyei;
Carolyn Dawson, by her next friend Richard Dawson;
Tufanza A. Byrd, by her next friend Teresa Byrd;
Derek A. Dydell, by his next friend Maurice Dydell;
Terrance Cason, by his next friend Antoria Cason;
Jonathan Wiggins, by his next friend Rosemary Jacobs Love;
Kirk Allan Ward, by his next friend Mary Ward;
Robert M. Hall, by his next friend Denise Hall;
Dwayne A. Turrentine, by his next friend Shelia Turrentine;
Gregory A. Pugh, by his next friend David Winters;
on behalf of themselves and all others similarly situated;
Plaintiffs - Appellees,

American Federation of Teachers, Local 691
Intervenor - Appellee

v.

State of Missouri; John Ashcroft,
Governor of the State of Missouri;
Wendell Bailey, Treasurer of the State of Missouri;
Missouri State Board of Education;
Roseann Bentley, Member of the Missouri State Board of Education; Dan L. Blackwell, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Member of the Missouri State Board of Education; Susan D. Finke, Member of the Missouri State Board of Education; Thomas R. Davis, presiding President, Member of the Missouri State Board of Education; Cynthia B. Thompson, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri;

Gary D. Cunningham, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; School District of Kansas City, Missouri; Claude C. Perkins, Superintendent thereof;

Defendants - Appellees

Icelean Clark; Bobby Anderton; Eleanor Graham; John C. Howard; Craig Martin; Gay D. Williams; Kansas City Mantel & Tile Co.; Coulas and Griffin Insurance Agency, Inc.; Lucille Trimble; Berlau Paper House, Inc.; Andrew J. Winningham

Intervenors - Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 25, 1991
Filed: April 10, 1992

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

This case presents two issues as to whether property owners whose real estate taxes were affected by various orders in the Kansas City, Missouri, school desegregation case may obtain refunds of taxes they paid. The first issue concerns property owners who paid 1987 taxes under the levy directly set by the district court, *see Jenkins v. Missouri*, 672 F. Supp. 400, 412-13 (W.D. Mo. 1987), and who did not follow the Missouri protest statute, Mo. Rev. Stat. § 139.031. The Supreme Court reversed the judicial tax levy in *Missouri v. Jenkins*, 495 U.S. 33, 110 S. Ct. 1651 (1990), and the district court ordered the refund of 1987 taxes paid under protest. Order of Oct. 29, 1990, slip op. at 1. We now consider the claims of those taxpayers who did not protest, but nevertheless seek a refund. The second issue concerns the validity of 1988 taxes paid under a levy the school board set

pursuant to our decision in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988) (*Jenkins II*), but before our mandate issued in that case. The district court denied all claims for refund as to 1988 taxes. Order of Oct. 29, 1990, slip op. at 1-2. On appeal the intervenors[1] argue that even the 1987 payments not paid under protest should be refunded because the protest statute did not apply to such payments, and because fundamental principles of due process and just compensation mandate a full refund. The taxpayers also question whether the school board could legitimately set the 1988 tax before our mandate issued. We affirm the judgment of the district court.[2]

In its order of September 15, 1987, the district court ordered an extensive desegregation remedy, including a magnet plan and capital improvements programs, and ordered the property tax levy to be increased $1.95 over the existing levy, to $4.00 per $100.00 assessed valuation. 672 F. Supp. at 413. The real estate taxes for 1987 were levied under this order and billed to the taxpayers. Payment was due December 31, 1987. Some 9,000 Kansas City, Missouri School District (KCMSD) taxpayers paid their taxes under protest pursuant to Mo. Rev. Stat. § 139.031.[3]

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[1] The district court allowed a group of taxpayers to intervene for purposes of seeking refund of these real estate taxes. The intervenors were: Icelean Clark, Bobby Anderton, Eleanor Graham, John C. Howard, Craig Martin, Gay D. Williams, Kansas City Mantel & Tile Company, Coulas & Griffin Insurance Agency, Inc., Lucille Trimble, Berlau PaperHouse, Inc., and Andrew J. Winningham (hereinafter the Clark Group).

[2] The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

[3] Mo. Rev. Stat. § 139.031 (1987 Supp.) (amended in 1989) provided in part:

> 1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the director of revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based. . . .

(Footnote 3 continued on next page)

The protested payments amounted to a total of $10,695,197. As prescribed in the statute these funds were escrowed and the taxpayers, represented by Landmark Legal Foundation (also counsel for intervenors in this case), instituted state court refund actions. Payments amounting to $23,140,758 were made by other taxpayers without the filing of protests.

In *Jenkins II*, decided August 19, 1988, we affirmed the district court's order setting the 1987 levy, 855 F.2d at 1314, but we prescribed a different procedure for future funding requirements. *Id.* We stated that the school board should be authorized to submit a proposed levy to collection authorities adequate to fund its budget, and that county and state authorities should then be enjoined from applying Missouri constitutional and statutory limitations that would limit or reduce the levy below the amount the school board submitted. *Id.* The amount of the levy was to be subject to reasonable limitations to be set by the district court. *Id.* The Supreme Court granted certiorari to review the taxation orders, and in *Missouri v. Jenkins*, 495 U.S. 33, 110 S. Ct. 1651, decided April 18, 1990, the Court held that the district court's order levying the tax was beyond its powers and unlawful, but affirmed the future funding formula this court set out in *Jenkins II*. 110 S. Ct. at 1662-63, 1666.

On September 13, 1988, a little less than a month after we filed our *Jenkins II* opinion, the Kansas City school board authorized counsel to move the district court to approve a property tax levy

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(Footnote 3 continued)

2. The collector shall disburse to the proper official all portions of taxes not disputed by the taxpayer and shall impound in a separate fund all portions of such taxes which are in dispute. Except as provided in subsection 3 of this section, every taxpayer protesting the payment of taxes shall, within ninety days after filing his protest, commence an action against the collector by filing a petition for the recovery of the amount protested in the circuit court of the county in which the collector maintains his office. . . .

of $4.23. At the same time the board resolved that if the district court did not rule on the motion by October 11, 1988, the County's deadline for certifying the levy, the board "anticipates that at that time it will set the 1988-89 levy rate at $4.00 . . . pursuant to Judge Clark's September 15, 1987 ruling." KCMSD attorneys filed the motion, but the district court did not rule on the motion by October 11, 1988, because this court's mandate had not issued. Consequently, on October 11, 1988, the Board voted to set the 1988 levy at $4.00 pursuant to the district court's September 15, 1987, ruling. This court's mandate issued October 14, 1988, after we denied motions for rehearing. On January 3, 1989, the district court denied KCMSD's motion to set the 1988 maximum levy at $4.23 and held that it should not be increased from $4.00.[4]

The Clark Group then moved to intervene and the district court allowed the intervention "for the limited purpose of seeking a . . . full refund of the Court-ordered property tax." Order of Oct. 29, 1990, slip op. at 1. The district court held that the 1987 taxes paid under protest should be refunded, but denied refund of any of the rest of the real estate taxes. *Id.* at 1-2.

The district court rejected the claim that 1987 taxes paid without protest should be refunded. It held that under Missouri law taxes once paid can only be recovered through compliance with the protest statute. *Id.* at 5-6. Relying on *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990), the district court rejected the intervenors' constitutional claims because the protest procedure was available. Slip op. at 7.

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[4]The 1988 taxes had been billed and would have been delinquent if not paid on or before December 31, 1988. Ten thousand taxpayers paid approximately $9,379,400 of the 1988 taxes under protest pursuant to Mo. Rev. Stat. § 139.031.

With respect to the 1988 property taxes, the district court held that in its September 13 and October 11, 1988, actions the KCMSD school board had followed the modified procedure approved by this court and ultimately affirmed by the Supreme Court. Slip op. at 10. The district court's January 3, 1989, order tacitly approved as reasonable the school board's October 11, 1988, action. Order of Oct. 29, 1990, slip op. at 10-11; *see* Order of Jan. 3, 1989, slip op. at 6. It rejected the intervenors' argument that any actions the board took before our mandate had issued were based on the court-ordered levy that the Supreme Court eventually reversed. While the delay in issuing the mandate prevented the district court from taking action, it did not prevent the KCMSD board from setting its own levy at the same rate previously approved by the district Court. *Id.* at 12. Moreover, at the time the taxes were paid, our mandate modifying the district court order was in effect. *Id.* The district court held that the protested funds collected under the 1987 tax levy should be refunded to the protesting taxpayers, and that the escrowed tax payments for 1988 and 1989 should be paid to the State to satisfy certain obligations between the State and KCMSD under earlier orders of the court. *Id.* at 16.

I.

In attacking the district court's refusal to order refund of unprotested 1987 taxes, the intervenors argue that the judicial levy of 1987 taxes was an unlawful taking of taxpayers' property implicating Fifth and Fourteenth Amendment just compensation and due process rights. They claim that the Constitution requires refund of the payments not made under protest as well as those made under the statutory protest procedure. The intervenors also argue that Mo. Rev. Stat. § 139.031 does not apply to the type of taxes involved here, but that if the district court considered it applicable it should have notified taxpayers of the need to make payments under protest.

We reject the intervenors' argument that the state refund procedure does not apply to taxes levied by a federal court. Section 139.031 refers broadly to "any taxes." The intervenors contend that the statute can only apply to taxes levied by state authority, but we do not see the origin of the levy as the crucial issue. While the district court did order the levy increase, the levy was nevertheless in all other ways treated as an ordinary state property tax. The district court did not purport to be creating a new type of tax, but merely augmenting the existing KCMSD property tax. 672 F. Supp. at 413. It was billed by the county tax authorities and paid to those authorities for the benefit of the state school district. In fact, the intervenors' brief refers to the levy several times as a "property tax."

As the district court correctly observed, the protest procedures of section 139.031 have been applied to a variety of taxes. *See, e.g.., Boyd-Richardson Co. v. Leachman*, 615 S.W.2d 46 (Mo. 1981) (en banc) (merchants' and manufacturers' license taxes collected under unconstitutional statute); *B & D Investment Co. v. Schneider*, 646 S.W. 2d 759, 760 (Mo. 1983) (en banc) (invalid property tax). Missouri courts have held that "[a] taxpayer's failure to follow the mandate of [section 139.031.1] has consistently been held to bar his claim of impropriety of any part of the taxes he has paid . . . unless such a refund is expressly authorized by another statutory provision." *Buck v. Leggett*, 813 S.W.2d 872, 877 (Mo. 1991) (en banc). The intervenors do not argue that any other statute entitles them to a refund. Thus, even though this tax did not originate under state law, we conclude that it would be subject to the protest requirement.

We also reject the intervenors' argument that requiring compliance with the protest procedures violated due process. The district court relied on *McKesson* in holding there was no due process deprivation. Order of Oct. 29, 1990, slip op. at 7. In *McKesson*, the Supreme Court held a certain Florida tax law unconstitutional. However, Florida's tax procedures did not

provide a method by which the taxes could be refunded. The Court held that:

> [I]f a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

110 S. Ct. at 2242. Yet *McKesson* discussed in detail the procedural safeguards that would at once protect the State's interests in orderly tax collection and the taxpayers' due process rights:

> A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. *The State might for example provide by statute that refunds will be available only to those taxpayers paying under protest* or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitation applicable to such actions; refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; *and/or place challenged tax payments into an escrow account* or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax.

110 S. Ct. at 2254-55 (footnote omitted) (emphasis added). *McKesson* thus specifically approves the protest and escrow procedures that are at the heart of section 139.031.

The intervenors also argue that they did not have notice that the protest procedure would apply. The Supreme Court has made clear that "[a]ll persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them." *Texaco. Inc. v. Short*, 454 U.S. 516, 532 n.25 (1982) (quoting *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925)); *Ross v. Martin*, 800 F.2d 808, 811 (8th Cir. 1986) (holding taxpayers were presumed to have notice of similar Arkansas tax protest law). Moreover, the intervenors admit that their counsel, Landmark Legal Foundation, publicized the availability of the protest process before the 1987 tax was collected and indeed, held several press conferences on the subject.

Insofar as the intervenors assert a claim of a taking without just compensation, the issue is raised for the first time on appeal, and we do not consider such issues. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Westcott v. City of Omaha*, 901 F.2d 1486, 1490 (8th Cir. 1990).

II.

Intervenors argue that the district court erred in denying refunds of the 1988 property taxes (whether or not paid under protest). They argue that in order to make a valid levy the district court had to reverse its previous order, set a permissible maximum, and let the school board levy the tax. This the district court was not able to do because our mandate did not issue until October 14, 1988, three days after the taxes for the year had to be levied. Therefore, intervenors argue, the district court had no jurisdiction to take the necessary steps to result in a permissible levy. They also argue that the Supreme Court decision, 110 S. Ct.

at 1664 n.18, held that 1988 as well as 1987 taxes were collected under the invalid judicial levy.

We are not persuaded by the intervenors' attacks on the 1988 tax. The district court was correct in relying on the fact that "[t]he Board itself set the 1988 levy on October 11, 1988." Slip op. at 12. It is not important that the board acted three days before our mandate issued. While the district court had no jurisdiction to act in accord with our August 19, 1988, opinion before receiving this court's mandate, there was nothing to prevent the board from taking action.

We also reject the intervenors' argument that the procedures we mandated for future levies were not followed in that the district court did not give prior approval to a reasonable limit for the 1988 levy. The levy set on October 11, 1988, was the same amount that the court had set for 1987 (which obviously it had approved), and the court order of January 3, 1989, "tacitly approved as reasonable the Board's act on at its October 11, 1988 meeting to set the levy at $4.00." Order of Oct. 29, 1990, slip op. at 10-11. Moreover, since our mandate issued three days after the board's October 11 resolution, by the time the billing and collection took place, this court's decision as to future taxing procedures was fully effectuated by issuance of its mandate. The district court did not err in holding: "The taxes were collected lawfully in accordance with the Eighth Circuit's modified procedure." Slip op. at 12.

The arguments the intervenors assert with respect to the Supreme Court's decision are simply not supported by the language the court used in its opinion.

III.

We affirm the judgment of the district court that refunds may be made of property taxes only for the year 1987 and only for

taxes that were paid under the protest procedures of Mo. Rev. Stat. § 139.031.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: October 29, 1990]

Before the Court is Property Taxpayers' "taxpayers' " motion for leave to intervene for the limited purpose of seeking a refund and motion to recover a full refund of the Court-ordered property tax. The KCMSD and plaintiffs filed a joint response in which they did not oppose the taxpayers' motion for leave to intervene. The KCMSD and plaintiffs filed a motion in opposition to the taxpayers' motion to recover a full refund. The State responded to the taxpayers' motion to recover a full refund. The KCMSD and plaintiffs filed a reply to the State's response. The taxpayers filed a reply and a second reply memorandum in support of their motion to intervene and to recover a full refund. The KCMSD and plaintiffs filed a surreply to the taxpayers' motion to recover a full refund.

The Court shall not order a hearing on this matter. The Court shall allow the taxpayers to intervene for the limited purpose of seeking to recover a full refund of the Court-ordered property tax. The Court shall order all 1987 taxes paid under protest to be refunded. The Court shall not order the 1988 or 1989 taxes to be refunded.

Also before the Court is the State of Missouri's motion for an order directing that property tax funds currently held in escrow be applied to outstanding KCMSD obligations to the State. The KCMSD and plaintiffs filed a joint response to the State's motion. The State filed a reply to the joint response of the KCMSD and plaintiffs.

Intervention

Property taxpayers move this Court for leave to intervene pursuant to Fed. R. Civ. P. 24 in the above-captioned case for the limited purpose of asserting their rights and interests in the refund of the property tax levy imposed on them by this Court. Applicants are KCMSD property taxpayers and as a direct result of the Court's order of September 15, 1987 imposing a $1.95 property tax levy increase, applicants submit that they have paid an unlawful judicial property tax. Some applicants have paid these taxes under protest pursuant to Mo. Rev. Stat. § 139.031.

Applicants state that they have an immediate interest relating to the property which is the subject of the Supreme Court's April 18, 1990 decision and the Eighth Circuit's June 6, 1990 mandate to this Court. Applicants claim that they are so situated that the disposition of the court-ordered property tax refund issues will impair and impede their ability to adequately represent and protect their interests. Applicants state that neither the *Jenkins* class counsel, nor the KCMSD, nor the State of Missouri can adequately represent or protect the interests of the applicants. Applicants allege that all of these parties have made arguments contrary to the refund interests of the applicants.

Although the KCMSD and plaintiffs oppose the position of the taxpayers on the merits of the refund issue, they do not oppose the taxpayers' intervention for the limited purpose stated in their motion for leave to intervene. The KCMSD and plaintiffs emphasize that the taxpayers should be strictly limited to intervene for the purpose of asserting their rights and interests in the

refund of the property tax levy recently reversed by the Supreme Court. The taxpayers shall be allowed to intervene.

Intervenors request that this Court grant their motion to recover:

(a) a refund of all 1987 KCMSD property tax payments made in compliance with the $1.95 levy increase, whether paid under protest or not; and

(b) a refund of all 1988 and 1989 KCMSD property tax payments made in compliance with the $1.95 levy increase, whether paid under protest or not.

Intervenors also request that a fair and expeditious refund procedure be promptly established.

1987 Taxes

On September 15, 1987 this Court ordered a $1.95 tax levy increase which was affirmed and modified by the Eighth Circuit and reversed by the United States Supreme Court on April 18, 1990. In 1987, pursuant to Mo. Rev. Stat. § 139.031, approximately 9,000 taxpayers paid a total of $10,695,197 under protest. Icelean Clark *et al*. Reply Memo at 3. These funds have been held in escrow by Jackson County.

On August 19, 1989 the Eighth Circuit modified the property tax increase ordering that future funding of the KCMSD desegregation liability be accomplished by the Kansas City School Board submitting a levy to collection authorities adequate to fund its desegregation budget—subject to limitations set by the District Court. *Jenkins*, 855 F.2d at 1314. The intervenors assert that it is indisputable that the 1987 KCMSD property tax levy increase from $2.05 to $4.00 was the result of this Court's September 15, 1987 order. The intervenors submit that the Supreme Court's decision held that the 1987 property taxes were improperly collected and should be returned to the taxpayers.

The KCMSD, plaintiffs and the State of Missouri agree that the 1987 taxes should be refunded; "Icelean Clark, *et al.*, are correct insofar as they suggest that the 1987 tax levy increase has now been determined to be invalid." Opposition of KCMSD and Plaintiffs to Proposed Intervenor at 4.

Missouri statutes provide that, in the event a taxpayer is successful in his protest and recovery action, the protested tax payment—together with interest—is to be returned to the taxpayer by county collection officials. Mo. Rev. Stat. § 139.031.4 The intervenors maintain that all 1987 taxes should be refunded, whether paid under protest or not. The intervenors suggest that because of lack of knowledge or legal resources, taxpayers who paid a total of $23,140,758 did not make use of the Missouri protest provisions. Icelean Clark *et al.* Reply Memo at 6. However, the KCMSD, plaintiffs and State argue that the Court should only order a refund of those taxes paid under protest.

The intervenors cite *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 495 U.S. __, 110 S. Ct. __ (June 4, 1990) which stated that "the Due Process Clause of the Fourteenth Amendment obligates States to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." The intervenors contend that this Court must refund funds not paid under protest because specialized state protest and refund devices that usually apply only to taxes levied by the state could hardly be considered meaningful backward-looking relief for taxpayers seeking a refund of an unlawful tax levy. The intervenors suggest that principles of fundamental fairness and due process dictate a full refund for all taxpayers, regardless of whether they paid under protest.

The KCMSD, plaintiffs and the State argue that the intervenors ignore the requirements of Missouri law concerning taxes paid under protest. The KCMSD and plaintiffs argue that there is no proper legal basis for deviating from Missouri's statutory

requirements. In order for a taxpayer to be eligible for a refund, the taxpayer must have protested the tax at the time of payment and must have filed a petition seeking recovery of the taxes in the circuit court within ninety days after filing the protest. Mo. Rev. Stat. § 139.031.

Missouri law has consistently held that taxes, once paid, can only be recovered through proper statutory proceedings. *B & D Inv. Co. v. Schneider*, 646 S.W.2d 759 (Mo. 1983) (en banc). In B & D, the court held that a taxpayer must comply with the statute requiring a property owner to file a written statement with the collector protesting all or any part of taxes so paid. The statute exclusively prescribes the manner in which a taxpayer must proceed in paying illegally imposed taxes before the taxpayer may recover such taxes by judicial action. *Id.* at 763-4. *See also Adcor Realty v. State Tax Comm'n*, 627 S.W.2d 604, 606 (Mo. 1982) (en banc); *Xerox Corp. v. Travers*, 529 S.W.2d 418, 422 (Mo. 1975) (en banc). Specifically, the Missouri statute provides that "[a]ny taxpayer may protest all or any part of any taxes assessed against him. . . . Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based." Mo. Rev. Stat. § 139.031.(1).

The KCMSD and plaintiffs also submit that while the Court in *McKesson* reversed the Florida Supreme Court's refusal to order a refund of money collected through a tax scheme which was found to violate the Due Process Clause, it expressly noted that Florida law did not require a taxpayer to pay under protest in order to preserve the right to challenge a remittance in a post-payment refund action. *Id.* at 4667, n.4. Conversely, Missouri requires taxpayers to protest in order to preserve the right to bring a postpayment refund action. The Court in *McKesson* stated that the "state's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets [the state's concern for fiscal stability] with respect to future cases.

The state might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest." *Id.*

Thus, as long as the state has made a protest procedure available, there is no constitutional right to a refund of unlawfully collected taxes. The Supreme Court in *McKesson* noted that "States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation." *Id.* at 4674. Missouri has clearly adopted such a procedural protection by enacting a protest statute. *McKesson* emphasized that in postpayment recovery actions, the taxpayers' interests are not the only interests at stake; countervailing state interests in fiscal stability must also be considered. *McKesson* found that a protest requirement balanced competing interests. Such procedural measures would "sufficiently protect states' fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional tax." *Id.*

McKesson illustrated that there is no blanket refund requirement for money collected under a subsequently invalidated tax scheme. A state has the power to limit the circumstances under which it will be required to provide refunds. Therefore, only those 1987 tax payments paid under protest shall be subject to a refund. The Court notes that the full refund of the income tax surcharge provides no precedent for the return of non-protested 1987 property taxes. The income-tax surcharge was not covered by the protest statute but was subject to a separate statutory refund procedure. *See* Mo. Rev. Stat. § 143.801; *Homestake Lead Co. v. Director of Revenue*, 759 S.W.2d 847, 849 (Mo. 1988) (en banc).

The intervenors respond to the KCMSD, plaintiffs and State by suggesting that the protest provision under Mo. Rev. Stat. § 139.031 does not control this situation because the statute applies only to state taxes imposed by state and local taxing authorities—not to an unlawful judicial tax levied by a federal

court. The KCMSD and plaintiffs respond that the plain language of section 139.031(1) contradicts the intervenor's position. The statute clearly states that "any taxpayer may protest all or any part of *any* taxes assessed against him, except taxes collected by the director of revenue of Missouri." Even if the taxes were assessed by a federal court, the plain language of the statute allows protests of "any taxes", therefore the Missouri protest statute controls this case.

Taxpayers have routinely filed section 139.031 protests based on a variety of legal challenges, including protests that taxes were levied under an unconstitutional statute or on behalf of a governmental entity not properly meeting statutory requirements. *See Boyd-Richardson Co. v. Leachman*, 615 S.W.2d 46 (Mo. 1981) (en banc). The Court agrees that the plain language of section 139.031 applies to this case and a refund is appropriate only for properly protested 1987 property taxes.

The State proposes that, if escrowed funds are insufficient, refund payments authorized by the Court should be the responsibility of the KCMSD. The State claims that under the Supreme Court's April 18, 1990 decision, the KCMSD no longer has the option to choose not to pay its share of the remedial costs; requiring the State to make the refunds would "permit the KCMSD to simply disavow financial responsibility for the injury it has begotten while permitting it to propose, without risk, any expense and grandiose programs or facilities it might desire, without any concern for fiscal responsibility." State's Response at 13.

The KCMSD and plaintiffs disagree with the State's position, suggesting that it is irrelevant and incorrect to suggest that additional refund payments could be made by the KCMSD and financed by a tax increase regardless of the reasonable limits required by the Eighth Circuit. More importantly, the KCMSD and plaintiffs submit that as a matter of law, only properly

protested property taxes are eligible for a refund. These funds are currently held in escrow so no question need arise about the source of a refund.

1988 Property Taxes

While the Eighth Circuit affirmed this Court's $1.95 KCMSD property tax increase, it instructed that future funding of KCMSD's obligations under the desegregation plan be modified. *Jenkins v. Missouri*, 855 F.2d 1295, 1314 (8th Cir. 1988). Future levies were to be set by the Kansas City School Board—subject to limits set by the District Court. The Eighth Circuit's August 19, 1988 opinion stated that the levy must be set by the KCMSD rather than the District Court. The Eighth Circuit's mandate was issued on October 14, 1988.

The intervenors argue that, prior to October 14, 1988 the District Court did not have jurisdiction to implement the modification set forth in the mandate. The intervenors suggest that the court did not technically implement the modification until nearly one full year later when, in its September 13, 1989 order, this Court approved the 1989 levy set by the Kansas City School Board pursuant to the August 19, 1988 opinion of the Eighth Circuit. While it may be technically correct that the district court did not have jurisdiction to implement the modification mandated by the Eighth Circuit, there is no question that the KCMSD followed the modified procedure approved by the Eighth Circuit and affirmed by the Supreme Court. The proper focus is on what action the KCMSD took.

On September 13, 1988 the KCMSD met and voted to seek approval of a cap on the district's property tax levy of no more than $4.23 for $100 of assessed valuation pursuant to the August 19, 1988 opinion of the Eighth Circuit Court of Appeals. The KCMSD stated that *it* would officially set the levy at the new maximum rate once the Court ruled. If the District Court did not rule on the KCMSD's motion by October 11, 1988, the Board

anticipated that *it* would set the 1988-89 levy at a rate of $4.00 per $100 assessed valuation pursuant to this Court's September 15, 1987 ruling. This Court ordered that because the 1988 tax bills had already been sent, it was too late to authorize a new maximum levy for 1988. January 3, 1989 Order at 6-7. Thus, the Court tacitly approved as reasonable the Board's action at its October 11, 1988 meeting to set the levy at $4.00. The intervenors argue that rejection of the proposed $4.23 levy cannot be considered as approval of the existing $4.00 levy.

Since the Eighth Circuit mandate had not come down, the intervenors argue that the property tax bills for 1988 were based on the court-ordered levy imposed in 1987 which was subsequently reversed by the Supreme Court. In addition, intervenors submit that the Supreme Court's opinion found that the KCMSD did not levy its own tax rate in October, 1988. Intervenors quote the language of the Supreme Court which stated that "The Court of Appeals required the District Court to use less obtrusive procedures beginning with the fiscal year commencing after the remand but did not require the District Court to reverse the tax increase that it had imposed for prior fiscal *years*." *Jenkins*, 110 S. Ct. at 1664, n.18. (emphasis added). The KCMSD, plaintiffs and State suggest that the intervenors read far too much into a single "s" in the word "years." The intervenors attempt to stretch the use of the plural word "years" into a factual finding about the propriety of the 1987 and 1988 tax levies. Yet, the Supreme Court avoided dictating the precise consequences of its ruling which was that only tax increases imposed pursuant to the Eighth Circuit's revised procedures were valid.

The Supreme Court remanded the case to the Eighth Circuit to determine whether the essential elements of its revised procedures were followed in setting the KCMSD property tax levy. The KCMSD, plaintiffs and State maintain that in 1988 the KCMSD itself adopted the $4.00 tax levy. Prior to the Eighth Circuit's decision, this Court and the KCMSD understood who

must set the levy for 1988. The Board itself set the 1988 levy on October 11, 1988.

Intervenors suggest that since the Eighth Circuit mandate had not yet issued, it was impossible for the parties to follow the Eighth Circuit's guidance on October 11, 1988. While the failure of the Eighth Circuit's mandate to issue before October 11, 1988 prevented the KCMSD from obtaining a ruling from this Court on its request for a higher limit, it did not prevent the KCMSD from setting its own levy at the same rate previously approved by this Court. The KCMSD followed the essential elements of the Eighth Circuit's modifications to the district court's previous orders. At its October 11, 1988 meeting, the KCMSD, *not* the district court, set the levy at $4.23 per $100 assessed valuation. Also, by the time the taxes set by the KCMSD's action of October 11, 1988 were actually collected, the Eighth Circuit's modification to the district court order was in effect. The taxes were collected lawfully in accordance with the Eighth Circuit's modified procedure.

Thus, the tax levies adopted by the KCMSD in 1988 and 1989, pursuant to the Eighth Circuit's decision, were valid and should be released to the KCMSD and paid to the State in accordance with the State's Motion of May 23, 1990 and Joint Response of Plaintiffs and KCMSD. The intervenors' request for a refund of protested and unprotested property taxes collected in 1988 and 1989 pursuant to the increase established by the KCMSD shall be denied.

Escrowed Taxes

The State of Missouri requests this Court to direct the property tax funds collected in 1988 and 1989 pursuant the orders of this Court, as modified by the Eighth Circuit and affirmed by the Supreme Court, to be paid directly to the State. During 1988 and 1989, $23,170,027 was collected and is currently held under protest by the Jackson County tax collection authority. State's

Motion at 2. The State understands that the Jackson County tax collection authority intends to release those funds to the KCMSD upon instruction from the Court.

In its order of February 22, 1988, this Court held that the KCMSD owes the State a credit of $7,427,638.77 pursuant to its reallocation of the respective obligations of the KCMSD and State for funding capital improvements under Phase I of the KCMSD Capital Improvements Plan. State's Motion at 2. The reallocation resulting in a credit to the State was a result of the Eighth Circuit's *Jenkins v. Missouri*, 807 F.2d 657, 685 (8th Cir. 1986) decision. In its orders of October 18, 1989 and November 2, 1989, this Court recognized that the KCMSD owes the State a total of $15,855,061. State's Motion at 2.

The payment which the State requests would abrogate the need for funds to be taken from the KCMSD operating budget to apply to the debts to the State. Recognizing that the KCMSD may intend to appeal the Court's determination that the base costs of the 198687 magnets are not properly desegregation expenses, the State requests that if the Court does not require Jackson County to immediately pay those funds over to the State to liquidate the KCMSD's debts, it should require the KCMSD to place any funds distributed by Jackson County in a new interest bearing escrow account pending resolution of any appeal. The State proposes that it would be prudent for the KCMSD to take advantage of the onetime availability of escrowed funds in order to pay off quantified past obligations to the State.

The KCMSD and plaintiffs agree, without waiving their rights under this Court's February 1, 1990 Order, that the Court should order the KCMSD to pay the State the property tax funds for years 1988 and 1989 which are currently held in escrow. With one caveat, the KCMSD would consent to such an order: the KCMSD is not willing to waive its rights under this Court's February 1, 1990 order to obtain further review of the October

18, 1989 and November 2, 1989 rulings. If these rights are preserved, the KCMSD is willing to pay the escrowed funds over to the State.

The State further argues that the KCMSD now has the capacity to obtain any funds necessary to pay all of its desegregation obligations, in full, without reliance on any other party. Specifically, the State submits that the concept of joint and several liability should no longer apply to allow the KCMSD to "stand idly by and to continue to propose even more extravagant and expensive programs for which the State would be obligated to pay some portion of the KCMSD's share." State's Motion at 7.

The KCMSD submits that the State is incorrect in its assertion that the KCMSD now has the capacity to obtain all funds necessary to pay all of its desegregation obligations in full and that joint and several liability should no longer apply in this case. The KCMSD notes that the Eighth Circuit's ruling on the tax relief ordered by this Court in *Jenkins*, 855 F.2d 1295, 1315-16 (8th Cir. 1988), left no doubt that the KCMSD might continue to lack adequate revenue to completely fund its share of the desegregation programs. The Eighth Circuit indicated that the property tax should not be raised to unreasonable levels merely to cover the KCMSD's share. The Eighth Circuit also stated that the "State does have an obligation to pay any required sums which are beyond the capacity of the school district." *Id.* at 1316, n.21. The Supreme Court affirmed the Eighth Circuit.

Thus, there is no basis for the State's assertion that the KCMSD must now pay all of its desegregation obligations, regardless of the availability of revenues to meet those obligations. This Court's orders as modified by the Eighth Circuit and affirmed by the Supreme Court provide a process for tax increases that yield desegregation revenue to offset part of the KCMSD's share. However, such orders do not eliminate the State's responsibility under principles of joint and several liabil-

ity to fund whatever portion of the District's obligation there may be in excess of the revenue generated by a reasonable levy rate.

Accordingly, it is hereby

ORDERED that property taxpayers' motion to intervene for the limited purpose of seeking a full refund is granted; and it is further

ORDERED that the 1987 tax levy increase was improper under the Supreme Court's decision in *Missouri v. Jenkins*, 495 U.S. __, 110 S.Ct. __ (April 18, 1990), and the protested funds collected under the 1987 tax levy and held in escrow shall be deemed available to be refunded to the affected taxpayers; and it is further

ORDERED that the parties shall file with the Court a proposed procedure to refund the affected taxpayers; and it is further

ORDERED that the tax levies set by the KCMSD in 1988 and 1989 are valid and operable and meet the constitutional requirements as set forth in the Supreme Court's decision in this matter; and it is further

ORDERED that the $23,170,027 in escrowed taxes for 1988 and 1989, plus accrued interest, shall be paid directly to the State to the extent necessary to satisfy the obligations described in this Court's orders of February 22, 1988 ($7,427,638.77), October 18, 1989 (7,804,780) and November 2, 1989 (8,050,281); and it is further

ORDERED that notwithstanding the above, the KCMSD and plaintiffs retain their rights under this Court's February 1, 1990 order to obtain further review of this Court's orders of October 18, 1989 and November 2, 1989; and it is further

ORDERED that the State continues to be jointly and severally liable for desegregation obligations.

/s/ Russell G. Clark
RUSSELL G. CLARK, JUDGE
UNITED STATES DISTRICT
COURT

Date: October 29, 1990

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: September 13, 1989]

Before the Court is the KCMSD's motion to alter or amend. No response was filed. The KCMSD's motion will be granted. Also before the Court is the KCMSD's, plaintiffs' and AFT 691's joint motion to set 1989 property tax levy rate. The joint motion will be granted. In addition, on or before December 22, 1989, the KCMSD shall submit to the Court a long-term financing plan for the KCMSD subsequent to the ending of the desegregation plan.

The KCMSD filed a motion to alter or amend this Court's order of August 4, 1989, for clarification of the drawdown procedure. In the order of August 4, 1989, the Court found that the incremental costs of the 1987-88 magnet school transportation plan totalled $5,658,667, with $398,268 attributable to interdistrict transportation. *Jenkins v. State of Missouri*, Order of August 4, 1989, at 2-3 (W.D. Mo. 1989). The Court held that the total costs were a joint and several liability of the State and the KCMSD and directed the State to pay $4,343,567 and the KCMSD to pay $1,315,100. *Id.* The KCMSD states in its motion that the State has contributed $3,236,750 toward its obligation

and the KCMSD has contributed $953,250 toward its obligation. The KCMSD seeks clarification that the remaining amount of $1,468,667 should be treated as a desegregation expense to be funded through the drawdown procedure established by the Court's January 3, 1989, order. Additionally, the Court's order of August 4, 1989, approves a procedure for subsequent years whereby the KCMSD will draw down funds for incremental transportation costs from the program account each month at a rate equal to 75% of the monthly magnet school transportation costs. *Id.* at 3. The KCMSD seeks clarification that the monthly incremental transportation costs should be charged pursuant to the drawdown procedure established by the January 3, 1989, order. No response was filed. Therefore, the KCMSD's motion to alter or amend will be granted and the remaining unpaid incremental magnet transportation costs for 1987-88 of $1,468,667 shall be funded pursuant to the revised drawdown procedure established by the Court's January 3, 1989, order. In addition, the estimated incremental magnet school transportation costs for subsequent years shall be charged pursuant to the drawdown procedure established by the Court's January 3,1989, order.

The KCMSD, plaintiffs and AFT 691 filed a joint motion to set 1989 property tax levy rate. The motion states that on August 22, 1989, the KCMSD school board approved a property tax levy rate of $4.00 per $100.00 assessed valuation for 1989. The parties believe that it would be appropriate to continue the $4.00 tax levy rate adopted pursuant to the Court's September 15, 1987, and January 3, 1989, orders in light of the United States Supreme Court's granting of certiorari on the question of whether the Court has authority to impose a property tax increase on citizens of a local school district to remedy past constitutional wrongdoings. The joint motion states that the State has no objection to the current $4.00 tax levy rate being maintained for 1989.

Previously this Court stated that "it has no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation plan." *Id.*, 672 F.Supp. 400, 412 (W.D. Mo. 1987). Therefore, the Court increased the KCMSD tax levy rate from $2.05 to $4.00 per $100.00 assessed valuation. *Id.* at 413. The Eighth Circuit approved the Court-ordered property tax increase and provided that in setting the tax levy rate "it is best to leave the selection of an appropriate limitation to the district court's discretion." *Id.*, 855 F.2d 1295, 1314 (8th Cir. 1988) (footnote omitted). In light of the fact that the United States Supreme Court has granted certiorari on the property tax levy rate issue, *Missouri v. Jenkins*, 109 S.Ct. 1930 (1989), the KCMSD school board approved a $4.00 tax levy rate, and all parties to this case agree that a $4.00 tax levy rate is appropriate, the Court will exercise its discretion and approve a $4.00 per $100.00 assessed valuation tax levy rate for 1989. Therefore, the KCMSD's, plaintiffs' and AFT 691's joint motion to set 1989 property tax levy rate will be granted.

In its order of July 25, 1988, the Court approved desegregation budgets through the 1990-91 school year, which is the sixth year of the plan. *Jenkins v. State of Missouri*, Order of July 25, 1988, at 29-30 (W.D. Mo. 1988). It is obvious that the desegregation plan cannot continue indefinitely. Therefore, the Court believes it is appropriate for the KCMSD to begin to develop a plan for long-term financing of the KCMSD once the desegregation plan has terminated. Therefore, on or before December 22, 1989, the KCMSD shall submit to the Court a long-term financing plan for the KCMSD subsequent to the ending of the desegregation plan.

Accordingly, it is hereby

ORDERED that the KCMSD's motion to alter or amend is granted; and it is further

ORDERED that the KCMSD's, plaintiffs' and AFT 691's joint motion to set 1989 property tax levy rate is granted; and it is further

ORDERED that the KCMSD shall submit to the Court a long-term financing plan on or before December 22, 1989.

/s/ Russell G. Clark
RUSSELL G. CLARK,
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: September 13, 1989

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: January 3, 1989]

Before the Court are intervenors' motion to recover full refund of Court-ordered income tax surcharge and plaintiffs' motion for full refund of income tax surcharge. Intervenors' and plaintiffs' motions will be granted. The Missouri Department of Revenue's proposed surcharge refund process will be approved as modified in this order and the Missouri Department of Revenue shall complete the surcharge refund process within 120 days from the date of this order, with the exception of requests received thereafter. Also before the Court is the KCMSD's motion for approval of a revised drawdown procedure and the State's motion for modification of program account and for KCMSD refund of tax proceeds. The KCMSD's motion will be granted as modified in this order and the State's motion will be granted in part as modified in this order and denied in part. Additionally, before the Court is the KCMSD's motion for approval of a maximum property tax levy rate. The KCMSD's motion will be denied without prejudice.

To enable the KCMSD to meet its share of the costs of the desegregation plan, this Court imposed a 1.5% income tax

surcharge on "salaries, wages, commissions and all other compensation and income subject to the Missouri State Income Tax for work done, services rendered and business or other activities conducted within the KCMSD." *Jenkins v. State of Missouri*, 672 F.Supp. 400, 412 (W.D. Mo. 1987). However, the Eighth Circuit reversed this Court's imposition of the income tax surcharge and stated that "[a]ny unexpended collections must be refunded and the district court is directed to take such action as it deems appropriate with respect to any further refunds." *Jenkins v. State of Missouri*, 855 F.2d 1295, 1316 (8th Cir. 1988). Subsequent to the Eighth Circuit's reversal, taxpayers Eleanor Graham, et al., were granted leave to intervene and filed a motion to recover full refund of the income tax surcharge. Additionally, plaintiffs filed a motion for full refund of the income tax surcharge. A hearing was held regarding the income tax surcharge refund on December 8, 1988. The KCMSD and the State did not oppose a full refund of the income tax surcharge. The Court is convinced that all income tax surcharge collections should be fully refunded. Therefore, intervenor's motion to recover full refund of Court-ordered income tax surcharge and plaintiffs' motion for full refund of income tax surcharge will be granted.

The mechanics of an income tax surcharge refund were discussed at the December 8 hearing. All parties have deferred to the Missouri Department of Revenue to determine the most efficient method of making the surcharge refund. At the December 8 hearing, the Court stated that "it is going to be pretty much the responsibility of the Department of Revenue, their expertise and responsibility, to get the refund made, and certainly [they] have some experience in collecting the tax as well as making the refunds" and "[t]he Court certainly is inclined to approve whatever they want to make a refund." (Tr. at 27, 30). Subsequently, the State filed a proposed refund procedure recommended by the Missouri Department of Revenue. The Court will approve the proposed refund procedure as modified below.

Refunds for 1987 surcharge collections will be issued directly to individual and corporate taxpayers whose net amount of income tax surcharge paid can be verified by the Missouri Department of Revenue from records in its possession by reference to the KC-1 (individual) or KC-2 (corporate) form filed by the taxpayer.

Taxpayers who did not file a 1987 KC-1 form with the Missouri Department of Revenue will be issued a refund upon filing the KC-1 form with the Missouri Department of Revenue with a copy of the taxpayer's 1987 W-2 form attached for withholding verification. In order to inform taxpayers who did not file a KC-1 or KC-2 form for 1987 of the right to a refund of surcharge collections, the Missouri Department of Revenue shall give legal notice by publication as required by Missouri statutory law of the refund and the refund process. Additionally, the Court strongly encourages the Missouri Department of Revenue to take any other actions reasonably necessary to give notice of the right to a refund to taxpayers who did not file a KC-1 or KC-2 form for 1987. Such actions may consist of press releases, published advertisements containing a KC-1 or KC-2 form for 1987 that can be sent to the Department of Revenue to obtain a refund or sending a copy of the 1987 KC-1 and KC-2 forms with tax refunds.

All surcharge amounts withheld for employees by employers during 1988 will be refunded by check mailed to the employer for the total amount withheld by that employer for all employees. Employers will make the refund payment directly to the employees. These amounts will be determined from records in the possession of the Missouri Department of Revenue.

Individuals who have made quarterly surcharge payments for 1988 will receive the amount remitted via a refund check mailed directly to the taxpayer. The Missouri Department of Revenue will determine these amounts from its records. Individuals who

make estimated payments and are also employees subject to withholding will receive two separate payments, one by check from the Missouri Department of Revenue for the estimated declaration payments and one payment from their employer for the amount withheld by the employer. Refunds to corporations for estimated declarations paid as determined by Missouri Department of Revenue records will be accomplished by refund check mailed from the Missouri Department of Revenue to the corporate taxpayer.

All refund checks returned to the Missouri Department of Revenue by the postal system will be handled by the Department of Revenue in the same manner as the Missouri State Income Tax postal return refund checks.

The Missouri Department of Revenue has indicated that the refund process could be completed within 120 days of its initiation, with the exception of requests for refunds that are received thereafter, and has requested that the refund process be implemented after January 1, 1889. Therefore, the Missouri Department of Revenue shall complete the income tax surcharge refund process within 120 days from the date of this order, with the exception of requests received thereafter.

The KCMSD filed a motion for approval of a revised drawdown procedure arguing that the Eighth Circuit's reversal of the income tax surcharge imposed by this Court has caused the current drawdown procedure to become inadequate. The State countered with a motion for modification of program account and for KCMSD refund of tax proceeds. Although the Eighth Circuit reversed this Court's imposition of the 1.5% income tax surcharge, the Eighth Circuit continued by stating: "We caution that the constitutional violations must be remedied and the remedies fully funded. Any refund orders must be crafted recognizing this fundamental principle." *Jenkins*, 855 F.2d at 1316. Recognizing that the constitutional violation remedies

must be fully funded, the Court will modify the existing program account and drawdown procedures as set forth below.

The cap on the existing program account will be increased to $11 million, without regard to the KCMSD's desegregation revenues, and the State will be required to meet this cap on or before January 15, 1989, and on the first day of each month thereafter. The KCMSD shall pay all Court-ordered desegregation expenses as incurred with all available desegregation revenues and the State will be required to pay the balance of the remaining expenses from the program account as a jointly and severally liable party. Once the KCMSD's desegregation funds available during a given month have been depleted as expenditures occur, including funds needed to satisfy desegregation expenses to be funded 100% by the KCMSD, the KCMSD will draw from the program account to cover the remaining expenditures for that month. Interest on any unused money in the account will be credited to the State.

On or before the 15th day of each month, beginning in February of 1989, the KCMSD shall develop a reconciliation statement identifying actual expenditures from the account and interest on the account accrued to the State for the prior month, which will set the amount of the State's deposit on or before the first day of the next month in order to reinstate the $11 million cap. In addition, on or before the 15th day of each month beginning in February of 1989, the KCMSD shall provide the State with a statement of the KCMSD's desegregation revenues actually received and all Court-ordered desegregation expenses actually incurred in the prior month. In any case in which the KCMSD anticipates that the following month's expenditures from the account will exceed the balance in that account, the KCMSD shall provide written notification of such to the State on or before the 15th day of the prior month. Absent further Court order to the contrary, the State shall deposit the amount necessary to fund such additional costs on or before the first day of the month in which they are projected to occur.

The State filed a motion seeking to require the KCMSD to contribute $5,274,962.00 toward the full refund of the income tax surcharge collections. Apparently the KCMSD is willing to contribute $21,642,147.00 toward the refund, which is the amount of unexpended desegregation revenues from both the income tax surcharge and the Court-ordered increase in the property tax levy rate the KCMSD had available on August 19, 1988. However, the KCMSD is willing to make such a contribution only so long as a revised drawdown procedure is approved by the Court which includes State funding of the amount necessary to cover desegregation expenditures incurred after August 18, 1988. The KCMSD has been using the $21,642,147.00 of unexpended desegregation revenues to fund desegregation expenditures incurred after August 18, 1988. Ordinarily the Court would require the KCMSD to contribute $21,642,147.00 to the income tax surcharge refund. However, in the current situation such a requirement would actually consist of only accounting entries. The KCMSD has used the desegregation revenues to fund desegregation expenditures subsequent to August 18,1988. If the KCMSD was ordered to contribute such funds to the State for the surcharge refunds, the KCMSD would have no funds with which to pay the desegregation costs. Due to the joint and several liability of the KCMSD and the State for desegregation expenditures, the State would have to fund all desegregation costs the KCMSD cannot pay through the modified program account and revised drawdown procedure previously set forth in this order. Therefore, it would be useless for the Court to order the KCMSD to make a contribution to the State for the surcharge refund. The KCMSD shall use any currently unexpended portions of the $21,642,147.00 of desegregation revenues to fund desegregation costs prior to the implementation of the modified program account and revised drawdown procedure required on or before January 15, 1989. Any unexpended portions remaining at the date of the implementation of the modified program account and revised drawdown procedure shall be treated by the KCMSD the same as any other KCMSD desegregation revenues.

The KCMSD filed a motion for approval of a maximum property tax levy rate of $4.23 per $100 of assessed valuation pursuant to the Eighth Circuit's opinion in *Jenkins*, 855 F.2d at 1308-1315. Plaintiffs and the State did not oppose the KCMSD's motion. An *amicus curiae* brief was filed in opposition to the KCMSD's motion by a group of rural Missouri school districts. The Court is convinced that the property tax rate for 1988 should not be increased from $4.00 to $4.23. Such action would require supplemental billing by Jackson County, Missouri, that would lead to increased taxpayer resentment and also be time consuming and expensive. Nonetheless, in the alternative, the KCMSD has urged the Court to approve a $4.23 property tax levy rate for 1989. However, the Court believes that current approval of a $4.23 property tax rate for 1989 would be premature. The 1989 property tax levy rate should be set at a later date when the KCMSD's financial picture for the 1989-1990 school year is much clearer. Therefore, the KCMSD's motion for approval of a maximum property tax levy rate will be denied without prejudice. The KCMSD School Board should approve a property tax levy rate for 1989 at a later date when financial calculations for the 1989-1990 school year are clear and submit the proposed levy rate to the Court for approval at that time.

Accordingly, it is hereby

ORDERED that intervenor's motion to recover full refund of Court-ordered income tax surcharge and plaintiffs' motion for full refund of income tax surcharge are granted; and it is further

ORDERED that the Missouri Department of Revenue's proposed surcharge refund process is approved as modified in this order and the Missouri Department of Revenue shall complete the surcharge refund process within 120 days from the date of this order, with the exception of requests received thereafter; and it is further

ORDERED that the KCMSD's motion for approval of a revised drawdown procedure is granted as modified in this order; and it is further

ORDERED that the State's motion for modification of program account and for KCMSD refund of tax proceeds is granted in part as modified in this order and denied in part; and it is further

ORDERED that the KCMSD's motion for approval of a maximum property tax levy rate is denied without prejudice.

/s/ Russell G. Clark
RUSSELL G. CLARK,
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: January 3, 1989

APPENDIX E

THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI

BOARD OF DIRECTORS
Board of Education Building
Kansas City, Missouri

MINUTES

August 22, 1989

The Board of Directors of the School District of Kansas City, Missouri, pursuant to official notification, met in a REGULAR MEETING on August 22, 1989 at 7 p.m. in the Board Room, Board of Education Building, 1211 McGee.

MEMBERS PRESENT: Ms. Sue Fulson, President
Mr. Paul B. Ballard
Mr. James P. Bonadonna
Mr. William DeFoor, Jr.
Mr. Fred Heine
Dr. Julia H. Hill
Rev. Robert L. Stephens
Dr. Sandra V. Walker

MEMBERS ABSENT: Mr. Carl Struby

OTHERS PRESENT: Dr. George F. Garcia, Superintendent
Mrs. Mildred U. LaBouff, Secretary

Ms. Sue Fulson, President, in the Chair.

HEARINGS AND COMMUNICATIONS

336325 Clinton Adams, Jr. expressed concern over District policies.

336326 Ron Finley, President of the NAACP, urged relaxation of the magnet school racial quotas.

336327 Dr. Julia Hill read a statement enumerating concerns she has with the Long-Range Magnet School Plan.

336328 Rev. Stephens moved, seconded by Dr. Hill, to waive Board Policy 4150 to allow Mr. Ed Newsome to address the Board. The motion was unanimously approved.

°Rev. Stephens/ Dr. Hill -motion approved unanimously

336329 Mr. Ed Newsome spoke on his concerns surrounding the special education programs.

* * *

August 22, 1989 Page 8

*B-1-A PROPOSED RESOLUTION: Move the approval of the recommendation of the Superintendent of Schools that the Board of directors authorize legal counsel to file appropriate papers in the *Jenkins v. State of Missouri* litigation, seeking the establishment of a cap on the District's property tax levy rate of no more than $4.00 per $100 of assessed valuation, pursuant to the August 19, 1988 opinion of the Eighth Circuit Court, the Board of Directors hereby sets its levy rate for FY 1989-90 at $4.00 per $100 of as-

336359

°Approved/ Consent Agenda

sessed valuation. The property tax levy of $4.00 would be distributed as follows:

Fund	Levy Rate
Teachers	$0.71
Incidental	1.25
Building	0.09
Operating Subtotal	$2.05
Debt Service	-0-
Court Ordered Desegregation Levy	
- Incidental	1.07
- Building	0.88[1]
Court Ordered Desegregation Levy Subtotal	$1.95
Total School Levy	$4.00

[1] The apportionment of the desegregation component of the levy rate is calculated pursuant to KCMSD's pending Motion to Alter or Amend the Court's August 4, 1989 Order regarding debt service. If the Court denies KCMSD's Motion, the apportionment of the desegregation component of the levy will be amended.

*C-1-A 336360	PROPOSED RESOLUTION: Move the approval of the recommendation of the Superintendent of Schools to approve an amendment to Tech Safe, Inc.'s contract to increase Asbestos Consulting fees in the amount of $22,000.00 Expenditures to be charged to Desegregation Phase VII (Asbestos) account code no. 7-89-582-0-676-2240-1.	°Approved/ Consent Agenda

APPENDIX F

THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI

BOARD OF DIRECTORS
Board of Education Building
Kansas City, Missouri

MINUTES
October 11, 1988

The Board of Directors of the School District of Kansas City, Missouri, to official notification, met in a REGULAR MEETING on Tuesday, October 11, 1988, 7 p.m. in the Board Room, Board of Education Building, 1211 McGee.

MEMBERS PRESENT: Ms. Sue Fulson, President
Mr. Paul B. Ballard
Mr. James P. Bonadonna
Mr. William DeFoor, Jr.
Mr. Fred Heine
Dr. Julia H. Hill
Rev. Robert L. Stephens
Mr. Carl Struby
Dr. Sandra V. Walker

MEMBERS ABSENT:

OTHERS PRESENT: Dr. George F. Garcia,
Superintendent of Schools
Mrs. Mildred U. LaBouff,
Secretary

Ms. Sue Fulson, President, in the Chair.

HEARINGS AND COMMUNICATIONS

335080 Ms. Lois Ellison, Washington/Wheatley Neighborhood Association, stated that her group preferred the B.T. Washington site for Wheatley School.

335081 Mr. Ballard moved, seconded by Mr. DeFoor, to waive Board Policy and to allow Ms. Evelyn Lee a fifteen minute block of time on the Hearings agenda.

The motion failed of passage by the following vote:

Ayes: Mr. Ballard, Mr. DeFoor

Noes: Ms. Fulson, Mr. Heine, Mr. Bonadonna,

Abstain: Dr. Hill, Rev. Stephens, Dr. Walker

Absent: Mr. Struby

* * *

WALK-IN

S-5-A PROPOSED RESOLUTION: Move the approval of the recommendation of the Superintendent of Schools that the Board of Directors set the 1988-89 levy rate at $4.00 per $100 of assessed valuation, pursuant to the September 15, 1987 ruling in Jenkins v. State of Missouri. The property tax levy of $4.00 is distributed as follows:

335086

°Mr. Bonadonna
Mr. DeFoor
-motion approved
-Mr. Bonadonna-No
-Mr. Struby-Absent

Fund	Levy Rate
Teachers	$1.28
Incidental	.71
Building	.06
Operating Subtotal	$2.05
Debt Service	-0-
Court Ordered Desegregation Levy	
- Incidental	1.07
- Building	.88
Court Ordered Desegregation Levy Subtotal	$1.95
Total School Levy	$4.00

Further, that the President and Secretary of the Board be authorized to certify the property tax levy to the Clerk of Jackson County.

*S-1-A 335087 PROPOSED RESOLUTION: Move the approval of the recommendation of the Superintendent of Schools for payment of legal fees for services rendered by Hogan & Hartson for the period August 1 through August 31, 1988, in the amount of $74,739.90

°Mr. Heine/ Mr. DeFoor -motion approved -Mr. Bonadonna- No -Dr. Hill- Abstained -Mr. Struby- Absent

S-2-A 335088	PROPOSED RESOLUTION: Move the approval of the recommendation of the Superintendent of Schools for payment for services rendered by Hall-Kimbrell Environmental Service, Inc. for the Kansas City, Missouri School District's asbestos cost recovery litigation in the amount of $52,471.46.	°Mr. Heine/ Mr. DeFoor -motion approved -Mr. Bonadonna- No -Mr. Struby- Absent

APPENDIX G

THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI

BOARD OF DIRECTORS
Board of Education Building
Kansas City, Missouri

MINUTES

The Board of Directors of the School District of Kansas City, Missouri, pursuant to official notification, met in a REGULAR MEETING on Tuesday, September 13, 1988, at 7 p.m. in the Board Room, Board of Education Building, 1211 McGee.

MEMBERS PRESENT: Ms. Sue Fulson, President
Mr. Paul B. Ballard
Mr. James P. Bonadonna
Mr. Fred Heine
Dr. Julia H. Hill
Rev. Robert L. Stephens
Mr. Carl Struby
Dr. Sandra V. Walker

MEMBERS ABSENT: Mr. William DeFoor, Jr.

OTHERS PRESENT: Dr. George F. Garcia, Superintendent
Mrs. Mildred U. LaBouff, Secretary

Ms. Sue Fulson, President, in the Chair.

HEARINGS AND COMMUNICATIONS

334948 Clinton Adams, representing Swinney/Volker SAC, spoke on the lack of responses to his various requests for information and commended Mr. DeFoor for his timely disclosure of consulting agreement terms.

334949 Barbara Mack Johnson and Armenta L. Walters, property owners in the Wheatley Elementary School, expressed concerns they have about the possibility of having to sell their homes for the new school site.

334950 Mr. Bill Grace, Mr. Ajamu Webster and Rev. Nelson Thompson urged the Board to appeal the decision to award a contract for computers to Tandy Corporation.

* * *

September 13, 1988 Page 4

WALK-IN

SEC-3-A PROPOSED RESOLUTION: °Mr. Ballard/ Mr. Heine

Move the approval of the recommendation of the Budget Committee Chair that the Board of Directors authorize legal counsel to file appropriate papers in the *Jenkins v. State of Missouri* litigation, seeking the establishment of a cap on the District's property tax levy rate of no more than $4.23 per $100 of assessed valuation, pursuant to the August 19, 1988 opinion of the Eighth Circuit Court of Appeals. Subject to the District Court's making such a ruling by October 11, 1988, the Board of Directors hereby sets its levy rate for FY 1988-89 at $4.23 per $100 of assessed valuation. If no such ruling is forthcoming by October 11, 1988, the Board of Directors anticipates that at that time it will set the 1988-89 levy

334958

-motion approved as amended -Mr. Bonadonna- No

rate at $4.00 per $100 of assessed valuation, pursuant to Judge Clark's September 15, 1987 ruling. The property tax levy of $4.23 is distributed as follows:

Fund	Levy Rate
Teachers	$1.28
Incidental	.71
Building	.06
Operating Subtotal	$2.05
Debt Service	-0-
Court Ordered Levy	
- Incidental	1.30
- Building	.88
Court Ordered Levy Subtotal	$2.18
Total School Levy	$4.23

Further, that the President and the Secretary of the Board be authorized to certify the property tax levy to the Clerk of Jackson County.

334959 Dr. Walker moved to amend the motion to insert the word "Desegregation" after Court Ordered . . . . . Levy in two places for clarification. (Amendment 1)

°Dr. Walker/
Mr. Heine
-motion approved
unanimously

The motion was seconded by Mr. Heine and unanimously approved by the Board.

Supreme Court, U.S.
FILED
SEP 11 1992
OFFICE OF THE CLERK

No. 92-69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ICELEAN CLARK, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents,
v.
STATE OF MISSOURI, *et al.*,
Respondents,
and
SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

BRIEF OF RESPONDENTS STATE OF MISSOURI, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

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Assistant Attorney General

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Attorneys for Respondents

**Counsel of Record*

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the lower courts properly applied Missouri law and this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) to deny refunds to taxpayers who failed to follow a state protest procedure to protect their right to a refund of a tax subsequently held invalid?

2. Whether the lower courts correctly found as a fact that the School District of Kansas City, Missouri followed procedures approved by this Court in *Missouri v. Jenkins*, 495 U.S. 33 (1990) in setting a levy increase in 1988 to provide funds for the school desegregation remedy in this case?

TABLE OF CONTENTS

	Page
Counterstatement of Questions Presented	i
Table of Authorities	iv
Counterstatement of the Case	1
Reasons for Denying the Writ	6
I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS IS CORRECT	6
A. The Decisions of the Lower Courts are Correct According to Missouri Law and This Court's Decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990)	7
B. The Record and the Findings of Fact by the District Court, Affirmed by the Court of Appeals, Demonstrate That the Property Tax Levy Set in 1988 Was Set by the School Board Pursuant to Procedures Approved by This Court	13
Conclusion	17

TABLE OF AUTHORITIES

Page(s)

Cases:

Adcor Realty v. State Tax Commission, 627 S.W.2d 604 (Mo. 1982) 9

American Trucking Association v. Smith, 496 U.S. 167 (1990) 16

Atkins v. Parker, 472 U.S. 115 (1985) 12

B & D Investment Company v. Schneider, 636 S.W.2d 759 (Mo. 1983) 8

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) 12

Edwards v. Arizona, 451 U.S. 477 (1981) 12

Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988) 3,11,13

Jenkins v. Missouri, 672 F.Supp. 400 (W.D. Mo. 1987) 2

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) ..... *passim*

Missouri v. Jenkins, 495 U.S. 33 (1990) ..... *passim*

North Laramie Land Company v. Hoffman, 268 U.S. 267 (1925) 12

Norton v. Shelby County, 118 U.S. 445 (1886) 12

Solem v. Stumes, 465 U.S. 638 (1984) 12

Texaco, Inc. v. Short, 454 U.S. 516 (1982) 12

United States v. Estate of Donnelly, 397 U.S. 286 (1970) 12

Xerox Corp. v. Travers, 529 S.W.2d 418 (Mo. 1975) .. 9

Constitutional Provisions, Statutes and Rules:

U.S. Const. amend. V 5,7

Mo. Rev. Stat. § 139.031 (Supp. 1987) (amended 1989) ..... *passim*

No. 92-69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ICELEAN CLARK, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents,

v.

STATE OF MISSOURI, *et al.*,
Respondents,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

BRIEF OF RESPONDENTS STATE OF MISSOURI, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The petition for certiorari relates to an issue in the Kansas City, Missouri school desegregation case which has previously been the subject of an opinion of this Court. *Missouri v. Jenkins*, 495 U.S. 33 (1990).

In order to fund the School District of Kansas City, Missouri's ("KCMSD") share of the costs of the remedy in the case, the district court ordered an increase in the property taxes paid by the residents of the KCMSD. *Jenkins v. Missouri,* 672 F.Supp. 400 (W.D. Mo. 1987). This increase was ordered on September 15, 1987. At the time this increase was ordered, the Petitioner's attorneys, Landmark Legal Foundation ("Landmark") publicized the availability of procedures to challenge that portion of the tax levy which was intended to pay part of the KCMSD's desegregation costs. Pet. App. A9. The procedures which Landmark publicized were those set out in Mo. Rev. Stat. 139.031 (Supp. 1987) (amended 1989) which establishes the method for paying taxes under protest and perfecting an appeal to the circuit court (the State trial courts in Missouri). The statute is to be used to pay under protest and seek judicial review of "any taxes" not due to the State's Director of Revenue. Mo. Rev. Stat. § 139.031(1)[1]. Pursuant to the terms of the statute, large numbers of taxpayers protested the portion of their school levies which was intended to pay desegregation costs.[2]

---

[1] The property taxes at issue here were not due to the State's Director of Revenue, but rather to the county which contained the KCMSD.

[2] According to the petitioners:

> Some 9,000 KCMSD taxpayers . . . paid a total of $10,695,197 of this [1987] levy increase 'under protest,' citing Mo. Rev. Stat. Section 139.031.

Pet. 4, n. 4.

The petitioners also assert that 10,000 taxpayers paid $9,379,400 of the 1988 taxes under protest. *Id.* at 6, fn. 5. Petitioners further asserted below that approximately 18,500 taxpayers paid $13,790,627 of the 1989 taxes under protest "pursuant to RSMo. § 139.031." Brief for Appellants, *Jenkins v. Clark,* No. 90-2977 WMKC, pg. 6, fn. 4.

The protested funds were escrowed according to State law. Mo. Rev. Stat. § 139.031.

In its August 19, 1988 opinion, the Eighth Circuit Court of Appeals affirmed the property tax increase but instructed the district court to modify the future method of obtaining desegregation funding. The Court of Appeals instructed the district court to refrain from directly setting the levy, but rather to authorize the KCMSD to adopt a levy. The district court's role would be "limited solely to establishing the maximum limit and enjoining enforcement of those provisions of Missouri law that prevent KCMSD from raising the money to remedy the constitutional violations." *Jenkins v. Missouri*, 855 F.2d 1295, 1314 (8th Cir. 1988).

This Court affirmed the modified procedures set forth by the Court of Appeals, but held that the Court of Appeals should not have allowed the district court's direct imposition of the increase to stand. *Missouri v. Jenkins*, 495 U.S. 33, 52 (1990). This Court did not specify the consequences of its holdings for the 1987 taxes in its opinion. Rather, it remanded to the Court of Appeals for further proceedings consistent with its opinion. *Id.* at 58.

Before discussing the events occurring after this Court's 1990 decision in this case, it is important to focus on certain events which occurred between the time of the Court of Appeals' August 19, 1988 opinion and this Court's April 18, 1990 opinion as the second issue raised in the petition implicates these events. At a meeting on September 13, 1988, the KCMSD Board voted indicating it would set its levy at the rate of $4.23 per $100 of assessed valuation. It further determined, however, that if the district court did not rule on its request by October 11, 1988, which was the deadline for issuance of 1988 property tax bills (for the 1988-89 school year), the Board would set the levy at $4.00 per $100 assessed valuation, thereby not exceeding the rate previously deemed to be reasonable by the district court. The KCMSD filed a motion in the district court on September 22, 1988 indicating their proposed course of action.

Because the Eighth Circuit's mandate from its August 19, 1988 opinion had not yet been issued, the KCMSD Board proceeded on October 11, 1988 to approve a $4.00 levy. The Court of Appeals' mandate, issued three days later, fully effectuated the Eighth Circuit decision on modified taxing procedures. After a hearing in December, 1988, which was publicized within the Kansas City metropolitan area and during which members of the general public and Landmark counsel spoke, the district court ruled on January 3, 1989 that the property tax should remain at $4.00, because the bills had already been sent to the taxpayers.[3]

After this Court's opinion in *Missouri v. Jenkins* validating the property tax increase except for that portion directly ordered by the federal district judge, the State respondents moved in the district court for an order directing that the tax funds which had been escrowed in 1988 and 1989 pursuant to the State protest procedures in Mo. Rev. Stat. § 139.031 be released and paid to the State to satisfy certain desegregation related debts owed by the KCMSD to the State. The Jenkins class plaintiffs and the KCMSD generally did not oppose the State's motion (on the condition that they wished to preserve their appeal rights as to the decisions which had created some of the debts of the school district to the State). Thereafter, the petitioners sought intervention and filed a motion seeking refunds of all 1987 and 1988 taxes, whether paid under protest pursuant to the statutory procedure or not.

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[3] In that same order, the district court declined to issue a ruling as to an appropriate levy for 1989 (for the 1989-90 school year). On August 22, 1989, the KCMSD Board again adopted a proposed tax levy rate of $4.00 per $100 of assessed valuation, and filed a motion with the district court seeking recognition of that rate as a reasonable maximum. The district court approved $4.00 as a maximum in light of the KCMSD Board's approval of such a rate, as well as the parties' agreement that such a rate was reasonable pending a ruling from this Court which had granted, in part, a petition for writ of certiorari to consider the issue. Pet. App. A28.

Consistent with this Court's ruling and the Missouri statutory protest procedure, the district court denied the petitioners' motion for a refund of the property taxes collected other than the taxes protested in 1987. It agreed with the arguments of the respondents that this Court's holding in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) permits the retention of taxes previously collected which have been declared unconstitutional, as long as a protest procedure has been made available. Pet. App. A17. It held that the Missouri protest statute applied to the tax regardless of the fact that the 1987 levy increase was ordered by the district court, because the statute allows the protest of "any taxes." Pet. App. A18. It also found that the KCMSD Board itself, and not the district court, set the 1988 levy in accordance with the modified procedures approved by both the Eighth Circuit and this Court. *Id.* at A18. The district court ordered the escrowed funds released to the State.

The petitioners appealed the district court's order to the United States Court of Appeals for the Eighth Circuit. That court affirmed the district court's order. The Court of Appeals rejected the intervenors' argument that the State procedures did not apply to the 1987 levy, concluded that such refund requests were subject to the protest requirement, Pet. App. A7, and that requiring compliance with the protest procedures did not violate due process. *Id.* at A9. On the issues regarding the 1988 levy the Court of Appeals agreed with the district court that the 1988 levy had been lawfully set by the KCMSD Board. *Id.* at A10.

REASONS FOR DENYING THE WRIT

The petition of Icelean Clark, et al., is not worthy of this Court's further consideration because the carefully considered opinion of the United States Court of Appeals for the Eighth Circuit, affirming the district court, is plainly correct on every argument raised by the Petitioners.– This Court has already decided the refund issue raised by the Petitioners in *McKesson* and there is no reason to reconsider the matter two years later. The fact-bound question of whether the KCMSD set its own levy in 1988 was also examined in detail by both the lower courts and need not be considered further.[4]

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The decision of the United States Court of Appeals for the Eighth Circuit is correct with regard to both of the questions raised by the petition. The Eighth Circuit properly applied this Court's decision in *McKesson*, to the property taxpayers who failed to protest the collection of property taxes under that portion of the district court's remedial order which was reversed by this Court in *Missouri v. Jenkins*, 495 U.S. 33 (1990). Both of the lower courts also correctly interpreted this Court's 1990 decision in *Missouri v. Jenkins* when they found that in 1988 the KCMSD itself set the property tax levy which was collected for the 1988-89 school year.

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[4]While the State and the other respondents, KCMSD, the Jenkins Plaintiffs and the AFT Local 691, have generally disagreed on most issues in this litigation, see, e.g., *Missouri v. Jenkins*, these parties are in the unusual position of being in agreement on the proper resolution of the issues raised by the petition.

A. The Decisions of the Lower Courts are Correct According to Missouri Law and this Court's Decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).

In declining to order refunds of all taxes paid due to the levy increases necessitated by the desegregation remedy, except for those paid under protest in 1987, both the district court and the Eighth Circuit correctly applied Missouri law and this Court's decision in *McKesson*, which recognizes the validity of State provisions requiring that taxes be paid under protest in order to preserve a right to a refund in the event the tax is later invalidated. As the Court of Appeals properly ruled, Pet. App. A7-8, *McKesson* makes clear that, as a matter of sound policy, even when a tax is unconstitutionally imposed, a state may limit refunds solely to those taxpayers who paid under protest. As this Court stated in *McKesson*, the commands of the due process clause are sufficiently flexible to allow states to impose limitations on the refund of even unconstitutional taxes because of State government's strong interest in financial stability:

> *The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest* or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitation applicable to such actions; refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; *and/or place challenged tax payments into an escrow account* or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds.

496 U.S. at 55 (footnote omitted) (emphasis added).

Needless to say, any sudden and unexpected order to refund millions of dollars would impact on other programs and services provided by the State. This is the type of unexpected fiscal trauma *McKesson* guarded against with its approval of protest requirements for taxes subsequently held invalid. Of the three categories of tax payments sought, the 1987 unprotested taxes, the 1988 protested taxes, and the 1988 unprotested taxes, only as to the 1988 protested funds had the State been on notice that there was a question as to whether these funds would be available to the State treasury, and that is by far the smallest of the three categories.

Missouri law requires that persons seeking to challenge property taxes pay their taxes under protest and perfect an appeal to the circuit court. Mo. Rev. Stat. § 139.031.2, states in relevant part:

> [E]very taxpayer protesting the payment of taxes shall, within 90 days after filing his protest, commence an action against the collector by filing a petition for the recovery of the amount protested in the circuit court of the county in which the collector maintains his office. If any taxpayer so protesting his taxes shall fail to commence an action in the circuit court for the recovery of the taxes protested within the time prescribed in this subsection, such protest shall become null and void and of no effect, and the collector shall then disburse to the proper official the taxes impounded . . .

The Missouri courts have held that a taxpayer who fails to follow the statutory procedure for filing and perfecting the protest thereby loses the opportunity to obtain a refund of the invalidly collected tax. See *B & D Investment Company v. Schneider*, 636 S.W.2d 759, 763-64 (Mo. 1983) (taxpayer's failure to comply with the statute requiring property owner to file written statement with collector protesting all or any part of taxes paid

precluded recovery of taxes paid pursuant to invalid increase in assessed valuation); *Adcor Realty v. State Tax Commission*, 627 S.W.2d 604, 606 (Mo. 1982) (Missouri Supreme Court affirmed dismissal of appeal to State Tax Commission on ground that the appeal was moot because taxpayer had lost his right to refund by failing to pay taxes under protest); *Xerox Corp. v. Travers*, 529 S.W.2d 418, 422 (Mo. 1975) (failure to follow statutorily-required procedure for payment under protest results in loss of statutorily-created right to refund of amount protested).

In this respect, Missouri law differs from the Florida law at issue in *McKesson*. As the district court stated in its opinion, this Court noted in *McKesson* that "Florida law does not require a taxpayer to pay under protest in order to preserve the right to challenge a remittance in a post-payment refund action." *McKesson*, 496 U.S. at 24, n. 4; Pet. App. A16. That was one reason why this Court reversed the Florida Supreme Court's refusal to order a refund of the invalid tax at issue there. But this Court's reversal in *McKesson* has no implication because of Missouri's protest requirements, which were specifically approved in *McKesson* as a way to avoid a full refund of an invalid tax.

The Petitioners do not argue that the Missouri protest procedure is invalid or that *McKesson* would not operate to validate it, admitting in their reply brief below that if the tax increase billed and paid pursuant to the district court's September 15, 1987 order is treated for refund purposes as a property tax levied by a local taxing authority, the Missouri statutory property tax protest scheme would apply and those taxpayers who did not comply with the State protest requirement of Mo. Rev. Stat. § 139.031 would not be entitled to a refund. See Reply Brief of Appellants, *Jenkins v. Clark*, No. 90-2977 WMKC (8th Cir.), pg. 1. Instead, Petitioners attempt to distinguish *McKesson* and the Missouri cases by arguing that the tax in question is federal and therefore the Missouri protest statute does not apply. Far from being a

judicial levy or a federal tax levied by a federal court, as this Court has recognized the property tax ordered by the district court invoked the traditional property tax mechanism provided by State law. *Missouri v. Jenkins*, 495 U.S. at 57 ("it is . . . clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation.") This Court did not hold that the district court had created a new tax in increasing the property tax levy.[5] Rather, this Court concluded the district court had erred in the procedure it invoked to effect the tax increase at issue and that the Eighth Circuit's modification to that procedure, requiring the KCMSD to set the levy itself, was constitutionally acceptable.

As the Court of Appeals noted:

> While the district court did order the levy increase, the levy was nevertheless in all other ways treated as an ordinary state property tax. The district court did not purport to be creating a new type of tax, but merely augmenting the existing KCMSD property tax. 672 F. Supp at 413. It was billed by the county tax authorities and paid to those authorities for the benefit of the State school district. In fact, the intervenors' brief refers to the levy several times as a 'property tax.'

Pet. App. A7. Indeed the fact that the property tax increase was merely an augmentation of a traditional method of school financing in Missouri was key to the Eighth Circuit's approval of the concept of funding some desegregation costs through the modi-

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[5] The petition cites frequently to the concurring opinion in *Missouri v. Jenkins*. *See*, e.g., Pet. 13. While the State Respondents might agree with much of what is said in the concurring opinion in *Missouri v. Jenkins*, particularly on the issues relating to the overall desegregation remedy, and indeed argued against the holding in *Missouri v. Jenkins*, the views of the concurrence did not command a majority of the Court.

fied procedures it adopted, requiring the Board to set the levy. In the same opinion, it struck down the district court's creation of a new mechanism for funding school operations requiring an entirely new collection process, through an income tax surcharge. *Jenkins*, 855 F.2d at 1315-16.

By its precise terms, the Missouri protest statute applies to any taxes not to be paid to the State's Director of Revenue, and therefore applies here, as tens of thousands of Missouri taxpayers recognized by invoking this protest mechanism in 1987 and subsequent tax years. As was developed in the district court record and as Petitioners acknowledge, Pet. 4, n. 4, and Pet. 6, n. 5, these sums protested reflect protests by approximately 9,000 taxpayers in 1987-88, 10,000 taxpayers in 1988-89, and 18,500 taxpayers in 1989-90.[6] Since even some of the petitioners availed themselves of the state statutory protest mechanism to protect their rights to refunds, their contention that the protest provision is inapplicable cannot be sustained. Further, the many protests of the September 15, 1987 tax under the Missouri statute were effective to preserve the taxpayers' rights to a refund, which they would not have been if the tax was something other than an augmentation of an existing tax. Taxpayers used the state procedures to perfect their protests for three years, and for many millions of dollars. As such, the district court's increase was merely an increase in an existing local property tax, which is an established method for obtaining revenue to operate public schools.[7]

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[6] By itself, the number of protests that have been reported should dispense with the Petitioners' contention that the Missouri protest statute is "arcane." Pet. 8.

[7] Petitioners open Section I of their petition arguing that "individuals and businesses forced to pay an unlawful tax against their will are entitled to a full refund," Pet. 9. They cite a number of cases which are not relevant at all to this issue. These precedents are erroneously relied upon by the Petitioner as the Respondents have pointed out in the courts below, and do not support the

(Footnote 7 continued on next page)

The Petitioners also advance certain general arguments in apparent support of their contention that fundamental principles of due process mandate the refund of all of the 1987 taxes. When the broad generalities are laid aside, it appears the only substantive assertion that is made is that taxpayers were provided inadequate notice, and as a result were deprived of a meaningful opportunity to challenge the tax. As the Court of Appeals properly noted, Pet. App A9, this Court has effectively disposed of the Petitioner's notice arguments:

> All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them . . . this is especially the case with respect to those statutes relating to taxation or condemnation of land.

Texaco Inc. v. Short, 454 U.S. 516, 532, fn. 25 (1982) (quoting *North Laramie Land Company v. Hoffman*, 268 U.S. 267, 283 (1925)); *Accord Atkins v. Parker*, 472 U.S. 115, 130 (1985). This argument is also effectively rebutted by the fact that many thousands of taxpayers protested the 1987, 1988 and 1989 property tax levies as Missouri law requires. The Petitioners had

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(Footnote 7 continued)

proposition for which they are cited. For example, *Solem v. Stumes*, 465 U.S. 638 (1984) was a criminal procedure case. The issue there was whether the standards of police conduct announced by this Court in *Edwards v. Arizona*, 451 U.S. 477 (1981), holding that once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him, should be applied retroactively. This Court said it should not be. Similarly, *United States v. Estate of Donnelly*, 397 U.S. 286 (1970) and *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940) have nothing to do with refunds of taxes. In fact, *Chicot County* discussed a situation tending to support a position which would be contrary to that presented by the Petitioners, where decrees made under a statute later found to be unconstitutional are allowed to remain in force. The case of *Norton v. Shelby County*, 118 U.S. 445 (1886) also has no apparent relevance. It did not concern the issue of whether an illegal tax should be refunded, but rather, whether a county bond issue was valid and the distinction between *de jure* and *de facto* officers.

ample opportunity to substantiate their claims as to inadequate notice in the district court and failed to do so. Moreover, as the Court of Appeals also noted in its opinion, Petitioners themselves sought to publicize the availability of the State protest process, and did so. Pet. App A9.

The dearth of support in the law for the Petitioners' arguments leads them to make obvious emotional appeals to this Court. See Pet. A17. This Court should reject that effort as it is no basis for exercise of its certiorari jurisdiction.

Therefore, under the Supreme Court's holding in *McKesson* and other decisions of this Court relating to notice, the Petitioners' contentions cannot be sustained, and Petitioners present no valid basis for review of the holding in *McKesson*.

B. The Record and the Findings of Fact by the District Court, Affirmed by the Court of Appeals, Demonstrate that the Property Tax Levy Set in 1988 Was Set by the School Board Pursuant to Procedures Approved by This Court.

As this Court has stated, the Court of Appeals' August 19, 1988 decision in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988) approved a procedure by which the district court would authorize the KCMSD to submit a levy to the State tax collection authorities, establish a reasonable maximum and enjoin the operation of any state laws that would limit or reduce the levy below the amount set by KCMSD. *Missouri v. Jenkins*, 495 U.S. at 52. The district court found that the property taxes for 1988-89 "were collected lawfully in accordance with the Eighth Circuit's modified procedure." Pet App. A21. The district court found that the KCMSD followed the essential elements of the "modified procedure approved by the Eighth Circuit and affirmed by the Supreme Court." Pet. App. A21. The district court then concluded this Court's mandate was satisfied because it was

the Board of Education for the KCMSD which itself set the 1988 levy on October 11, 1988. Pet. App. A21. In an order dated January 3, 1989, the district court indicated it had "tacitly approved as reasonable the Board's action at its October 11, 1988 meeting to set the levy at $4.00." Pet. App. A20. The Eighth Circuit approved the district court's findings on the issue of the KCMSD setting the 1988 levy. Pet. App. A9-10.

As both the district court and the Court of Appeals correctly noted, the proper focus is on what action the KCMSD took rather than on the technical question of the appellate mandate and when it took effect. Pet. App. at A10, A21. This Court indicated that allowing the KCMSD itself to adopt a tax increase was the critical factor in defining "[t]he difference between the two approaches" — direct judicial imposition of a tax and judicial authorization of the KCMSD to do so. *Missouri v. Jenkins*, 495 U.S. at 51. A district court order approving a levy set by the KCMSD Board was necessary only "because the Court of Appeals had required it to establish a maximum for the levy." *Id.* at 52, fn. 18.

On October 11, 1988, the KCMSD Board adopted, through its own action, a $4.00 levy for 1988, three days before October 14, 1988 when the Court of Appeals' mandate from its August 19, 1988 opinion was issued. The District had filed a motion for approval of a $4.23 property tax levy rate in the district court, indicating that if the new levy was not approved by the district court prior to the deadline for mailing the full 1988 tax bills, the Board would adopt a levy of $4.00, thereby not exceeding the previously approved rate. When the district court did not issue a ruling prior to the date set forth in the KCMSD's motion, the School Board adopted a levy of $4.00 and submitted that levy to the taxing authorities. No party objected to the Board's action. If the district court's invalid September 15, 1987 tax increase order remained in effect, it would not have been necessary to the Board to act at all on the levy. The local tax collection authorities

of Jackson County and the State were well aware they could take no action to prevent the increase pursuant to the Eighth Circuit's August 19, 1988 opinion. The $4.00 levy set by the KCMSD for 1988 used the district court's September 15, 1987 order not as an authority that the Board felt compelled to use, but rather as a reference for a levy rate which the Court had already found reasonable and to which no party would object in light of its consistency with the district court's previous order. The district court also ruled in October of 1990 that its January 3, 1989 order "tacitly approved as reasonable the Board's action at its October 11, 1988 meeting to set the levy at $4.00," Pet. App. A20, and this ruling was noted with approval by the Court of Appeals in its opinion. Pet. App. A10.

Despite the fact that the mandate had not issued, the district court and the parties understood in August, 1988 when the Court of Appeals issued its ruling regarding the remedy and the tax issues, that the Board had to set the levy for 1988 and all proceeded on the basis of that knowledge. Moreover, while the fact that the Court of Appeals' mandate did not issue before October 11, 1988 may have prevented KCMSD from obtaining district court approval for the higher levy that it preferred, it defies reason to argue that the absence of the mandate prevented the Board from setting its own levy, and submitting it to the collection authorities.

The Petitioners' attempt to stretch a single "s" in a footnote into a factual finding by this Court regarding how the 1988-89 levy was set cannot be countenanced. Pet. 20, quoting *Missouri v. Jenkins*, 495 U.S. at 52, fn. 18. This argument ignores the fact that this Court's partial reversal of the Court of Appeals and its remand instructions did not reflect such a specific finding. *Id.* at 51-52, 58. Petitioner's argument also fails to take into account this Court's approach to the remand in this case was consistent with its observations that "[w]hen we have held state taxes unconstitutional in the past, it has been our practice to abstain

from deciding the remedial effects of such a holding." *American Trucking Association v. Smith*, 496 U.S. 167, 176 (1990). The reason for this practice is "considerations of federal-state comity." *Id.* Further, the purpose of the footnote in question was not to resolve such factual issues. Rather, it seems plain this Court intended to establish that the Court of Appeals' ruling upholding "future" tax levy increases implemented according to modified procedures, and thus this Court's affirmance of such procedures, "was not dictum." 495 U.S. at 52.[8]

Therefore, the Court of Appeals' opinion concerning the actions of KCMSD and the district court regarding the 1988 levy was correct on the merits.

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[8] Petitioners mischaracterize other language from the same opinion relating to the same issue. In discussing the district court's January 3, 1989 order, this Court stated without declaring the consequences thereof, if any, that in the January 3, 1989 order the district court "took no action to reverse its tax increase through fiscal year 1988-89." 495 U.S. at 52, fn. 18. This Court stated further that in that same order the district court specifically acknowledged KCMSD's responsibility for setting the tax levy for the next school year, 1989-90. Thus, this Court concluded the district court itself had recognized that the Court of Appeals' August 19, 1988 ruling regarding future tax increases was not dictum. This Court never said, however, as Petitioners suggest, that it specifically held the district court's tax increase order invalid through fiscal year 1988-89. Pet. 19.

CONCLUSION

Petitioners have shown no basis for review by this Court. The petition for a writ of certiorari should be denied.

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September 11, 1992

No. 92-69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ICELEAN CLARK, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT BRIEF IN OPPOSITION OF RESPONDENTS KANSAS CITY, MISSOURI SCHOOL DISTRICT, ET AL., KALIMA JENKINS, ET AL., AND AMERICAN FEDERATION OF TEACHERS, LOCAL 691

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether any special and important issues of federal law are presented by the rulings of the lower courts, based on Missouri tax law, as well as clear and recent rulings of this Court, and pursuant to a broad remand order of this Court, that refunds of 1987 property taxes in the Kansas City, Missouri School District (KCMSD) should be limited to taxpayers who paid such taxes under protest, consistent with state law.

2. Whether any significant issue of law is posed by the lower courts' decisions that 1988 KCMSD property taxes were lawfully assessed, and that accordingly, no refunds thereof were appropriate, which rulings were based on fact findings as to respondent KCMSD's actions and motivations, and on the lower courts' interpretations of their own prior orders.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
COUNTERSTATEMENT OF THE CASE	1
A. The Underlying Funding Orders	2
B. Actions Pursuant to the Modified Procedures	5
C. The Tax Protests	6
D. The Tax Refund Proceedings	7
REASONS FOR DENYING THE WRIT	9
I. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE LOWER COURTS' DECISION TO LIMIT REFUNDS OF 1987-88 KCMSD PROPERTY TAXES TO TAXPAYERS WHO PAID UNDER PROTEST	10
II. GRANTING CERTIORARI TO REVIEW THE DENIAL OF KCMSD PROPERTY TAX REFUNDS FOR 1988-89 WOULD BE INCONSISTENT WITH THIS COURT'S TRADITIONAL DEFERENCE TO FINDINGS OF FACT BY LOWER COURTS, AND WITH THE COURT'S BROAD REMAND ORDER	16
CONCLUSION	22

TABLE OF AUTHORITIES

CASES: Page

American Trucking Associations v. Smith, 496 U.S. 167 (1990) 14
George Moore Ice Cream Co. v. Rose, 289 U.S. 373 (1933) 13
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 16, 18
Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 18
Jenkins v. Missouri, 672 F. Supp. 400 (W.D. Mo. 1987), *aff'd in part and modified in part*, 855 F.2d 1295 (8th Cir. 1988), *aff'd in part and rev'd in part*, 495 U.S. 33 (1991) 2, 3
Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied, Kansas City, Missouri School District v. Missouri*, 484 U.S. 816 (1987) .. 3
Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988), *cert. granted in part on other issues*, 490 U.S. 1034 (1989) 3, 4
Mathews v. Eldridge, 424 U.S. 319 (1976) 15
McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) 8, 12, 13, 14
Missouri v. Jenkins, —— U.S. ——, 112 S. Ct. 437 (1991) 3
Missouri v. Jenkins, 495 U.S. 33 (1990) ..... *passim*
NCAA v. Board of Regents, 468 U.S. 85 (1984) 18
North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925) 15
Rogers v. Lodge, 458 U.S. 613 (1982) 19
Texaco, Inc. v. Short, 454 U.S. 516 (1982) 15
Tiffany Arts, Inc. v. United States, 469 U.S. 310 (1985) 18
United States v. Ceccolini, 435 U.S. 268 (1978) 19
Zinermon v. Burch, 494 U.S. 113 (1990) 15

STATUTES:

Mo. Rev. Stat. § 139.031 ..... *passim*
Mo. Rev. Stat. § 139.031.1 10
Mo. Rev. Stat. § 139.031.2 10

TABLE OF AUTHORITIES—Continued

RULES: Page

Fed. R. Civ. P. 23 7
Sup. Ct. R. 10.1 10

IN THE

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OCTOBER TERM, 1992

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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JOINT BRIEF IN OPPOSITION OF RESPONDENTS KANSAS CITY, MISSOURI SCHOOL DISTRICT, ET AL., KALIMA JENKINS, ET AL., AND AMERICAN FEDERATION OF TEACHERS, LOCAL 691

OPINIONS BELOW

The decision below by the Court of Appeals has been reported as: *Jenkins v. Missouri*, 962 F.2d 762 (8th Cir. 1992). The district court's opinion is unreported.

COUNTERSTATEMENT OF THE CASE

Petitioners Icelean Clark, *et al.*, ask this Court to review the tax refund rulings that followed the Court's remand order in *Missouri v. Jenkins*, 495 U.S. 33 (1990) ("*Jenkins II*"). The decisions below involved the interpretation of a state statute, the application of clear principles of federal law, and judgments well within the discretion of the lower courts. These orders are unworthy

of this Court's scrutiny because Petitioners have presented no "special and important reasons" justifying this Court's review. Sup. Ct. R. 10.1.

In *Jenkins II* this Court held unlawful a district court decision to directly raise property taxes in the Kansas City, Missouri School District ("KCMSD" or the "District"),[1] *Jenkins v. Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987), and reversed the Court of Appeals, *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988), "insofar as it allowed the tax increase imposed by the District Court to stand." 495 U.S. at 58. However, this Court affirmed "the modifications to the District Court's order made by the Court of Appeals," *id.* at 52, and remanded "for further proceedings consistent with [*Jenkins II*]," *id.* at 58. On remand, the lower courts handled Petitioners' tax refund claims in a manner consistent with the commands of this Court.

A. The Underlying Funding Orders

The district court ordered an increase in KCMSD property taxes as a last resort, and as a measure to fund desegregation obligations which the District otherwise could not meet, because of state law constraints on its capacity to raise revenues. *See* 495 U.S. at 40-41. KCMSD's funding obligations arose from a series of court orders holding both KCMSD and the State of Missouri liable for expenditures necessary to remedy severe conditions of school segregation within the KCMSD. *Id.* at 37-41.[2]

[1] The Kansas City, Missouri School District respondents include the school district itself and its Superintendent, Dr. Walter L. Marks.

[2] KCMSD brought the original complaint in this action against the State and a group of suburban school districts surrounding Kansas City, Missouri; KCMSD later was realigned as a defendant and separate counsel was retained to represent the plaintiff schoolchildren. The case went to trial on the plaintiffs' claims and the cross-claims of KCMSD against the State. *Id.* at 37. Following the

On September 15, 1987, the district court ruled that KCMSD needed an increase in its property tax levy, among other measures, in order to fund desegregation. After taking into account various factors, including KCMSD's historical property tax rates and rates prevailing in other school districts in the KCMSD region, the district court concluded that an increase in KCMSD's levy rate from $2.05 to $4.00 (per $100 of assessed valuation) was appropriate. The district court ordered such an increase into effect through fiscal year 1991-92. *Jenkins v. Missouri*, 672 F. Supp. at 411-13; *see Jenkins II*, 495 U.S. at 41-42.[3]

In an opinion issued August 19, 1988, the U.S. Court of Appeals for the Eighth Circuit "affirm[ed] the actions that the [district] court had taken to th[at] point." 495 U.S. at 42-43. The Eighth Circuit "held that . . . state-law limitations [preventing KCMSD from raising funds sufficient to meet its desegregation obligations] must fall to the command of the Constitution." *Id.* at 42. The Court of Appeals also left untouched the district court's finding that a $4.00 property tax rate was reasonable and necessary for the KCMSD. *See* 855 F.2d at 1314-16. In addition, the Court of Appeals sustained the district court's decision to directly order such a tax increase; however, it "required that in the future, the District Court should not set the property tax rate itself." *Id.* at 43. Rather, the Court of Appeals declared, KCMSD should

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district court's liability order, the American Federation of Teachers, Local 691, was allowed to intervene. This Court has on three occasions declined to review rulings approving the components of the district court's remedy. *See Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied, Kansas City, Missouri School District v. Missouri*, 484 U.S. 816 (1987); *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988), *cert. granted in part on other issues*, 490 U.S. 1034 (1989); *Missouri v. Jenkins*, —— U.S. ——, 112 S. Ct. 437 (1991).

[3] The district court modified this order on October 27, 1987 in respects not relevant to the Petition.

adopt a levy on its own, within reasonable limits to be set by the district court, taking into account KCMSD's historical rates and the rates in neighboring school districts. *Id.* at 52; 855 F.2d at 1314, 1312. In reviewing several acceptable approaches to establishing such a limit, the Court of Appeals also explicitly approved at least one method that would have sanctioned a rate significantly higher than $4.00. *Id.*

The Court of Appeals recognized "that permitting the school board to set the levy itself would minimize disruption of state laws and processes and would ensure maximum consideration of the views of state and local officials." 495 U.S. at 43. In doing so, the Eighth Circuit set in motion " 'minimally obtrusive methods' " consistent with "principles of federal state comity." *Id.*

In April 1990, this Court ruled that the district court erred "in imposing the [KCMSD] tax [increase] itself" and that "[t]he Court of Appeals should not have allowed the tax increase to stand." 495 U.S. at 52. Accordingly, the *Jenkins II* decision "reversed the District Court in this respect," and remanded for the lower courts to correct this error. *Id.* The *Jenkins II* decision also affirmed "the modifications to the District Court's order made by the Court of Appeals." 495 U.S. at 52, 58. Indeed, this Court took care to explain that it did not view the forward-looking aspects of the Court of Appeals' order as dictum. Rather, the Eighth Circuit had modified an order that was effective prospectively, through fiscal year 1991-92, and had already required the school board—not the district court—to take the lead in setting the KCSMD tax levy. 495 U.S. at 52-53 n.18.

In approving the modified procedures ordered by the Eighth Circuit, this Court observed that they gave practical effect to the principle that "local authorities have the 'primary responsibility for elucidating, assessing, and solving' the problems of desegregation." 495 U.S. at 51. The Court also observed in this context that "no matter

has been more consistently placed upon the shoulders of local government than that of financing public schools." *Id.* at 52.

B. Actions Pursuant to the Modified Procedures

On September 13, 1988, the KCMSD Board of Education first took formal action to initiate a property tax increase—for fiscal year 1988-89—pursuant to the Court of Appeals' new procedures. The Board resolved, "pursuant to the August 19, 1988 opinion of the Eighth Circuit Court of Appeals," to ask the district court to approve a new reasonable maximum levy rate of $4.23 per $100 of assessed valuation. The Board agreed to submit such a rate to local tax authorities if the district court gave its approval by October 11, 1988, the deadline for assuring timely issuance of 1988-89 property tax bills. In the event that the district court failed to act by that time, the Board resolved to submit to local authorities the rate of $4.00, which the district court previously had found to be reasonable in its September 15, 1987 ruling. Pet. App. A47-A48.

The KCMSD Board next moved the district court to set a $4.23 levy rate limit for fiscal year 1988-89, indicating that the Board would officially set the levy at the new maximum rate once the court ruled. KCMSD also stated that if the Court of Appeals' mandate did not issue by October 11, 1988, thus arguably prohibiting the district court from timely approving a new reasonable maximum levy, the Board would adopt a levy of $4.00 for 1988-89, thereby not exceeding the rate previously deemed reasonable by the district court.[4]

The Court of Appeals issued its mandate on October 14, 1988. Three days earlier, as promised, KCMSD on its

[4] *See* "KCMSD Motion for Approval of a Maximum Property Tax Levy Rate and an Order Regarding Tax Abatements" (served September 21, 1988), at 3.

own had approved a levy rate of $4.00 for 1988-89, and submitted it to county tax collection officials. Pet. App. A43. Neither any of the original parties to this case, nor even Petitioners, objected to KCMSD's actions. On the contrary, in December 1988, Petitioners informed the district court they "agree[d]" with KCMSD that it had been the "appropriate course of action" for the District itself "to certify the present $4.00 rate . . . for the 1988-89 year," once the October 11, 1988 deadline had passed without the Court of Appeals' mandate being issued.[5]

On January 3, 1989, the district court denied KCMSD's still-pending motion to set a maximum tax levy rate of $4.23. The district court declared that because 1988-89 tax bills reflecting the $4.00 rate already had been sent, it was too late to authorize a new maximum levy for that year. Pet. App. A36.[6]

C. The Tax Protests

In 1987-88 and 1988-89, large numbers of KCMSD taxpayers paid the court-authorized $1.95 portion of their property taxes under protest, pursuant to state law, Mo. Rev. Stat. § 139.031, in order to challenge the legality of tax increases associated with funding desegregation. Approximately 9,000 taxpayers protested approximately $10.7 million in property tax payments for 1987-88. For 1988-89, approximately 10,000 taxpayers protested their

[5] Like KCMSD, Petitioners endorsed the $4.00 rate as reasonable under the circumstances, "pursuant to th[e District] Court's September 15, 1987 order" approving that rate. *See* "Amici Curiae Icelean Clark Et Al.'s Memorandum in Opposition to KCMSD's Motion for Approval of a Maximum Property Tax Levy Rate and For an Order Regarding Tax Abatements" (served December 7, 1988), at 4. Petitioners indicated they would challenge all desegregation-related tax increases not approved by the voters, but they did not contend the 1988-89 increase violated the Court of Appeals' modified procedures.

[6] The district court also held that KCMSD's request for a further increase in the levy rate to 4.23 for 1989-90 was premature. *Id.*

property tax payments of approximately $9.4 million. Pet. 4 n.4; 6 n.5. For both years, protests accounted for between 20% and 25% of all KCMSD property tax revenues attributable to the challenged tax increases.[7] One of the reasons so many taxpayers relied on state law tax protest procedures was public statements by Petitioners' counsel, at multiple press conferences, urging taxpayers to do so. *See* Pet. App. A9.

D. The Tax Refund Proceedings

The district court permitted Petitioners, eight individuals and three corporations subject to KCMSD's tax levy, to intervene in the *Jenkins* litigation to seek tax refunds for 1987-88 and 1988-89. Pet. App. A24. Although the Petition alleges the entitlement of all KCMSD taxpayers to refunds for the two years, Petitioners never sought class certification pursuant to Fed. R. Civ. P. 23, and no such relief ever was granted by the district court. The plaintiff schoolchildren, KCMSD and the State all opposed Petitioners' request for tax refunds, except for 1987-88 taxes paid under protest; none of the respondents opposed Petitioners' intervention request. *See* Pet. App. A13-A14.

The district court rejected Petitioners' claim for a full refund of all 1987-88 KCMSD property taxes collected pursuant to the $1.95 tax increase, regardless of whether filed under protest. Based on a careful analysis of state statutory and decisional law, the district court held that Mo. Rev. Stat. § 139.031, which limits refunds to taxpayers who paid under protest, "controls this case." Pet.

[7] Pursuant to Mo. Rev. Stat. § 139.031, these protested funds were held in escrow by Jackson County, Missouri officials. Pet. App. A14, A21. Petitioners acknowledged below that by fiscal year 1989-90, over 18,000 taxpayers made use of the protest process provided by Mo. Rev. Stat. § 139.031. *See* "Memorandum in Support of Intervenor Icelean Clark, Et Al.'s Motion to Recover Full Refund of Court-Ordered Property Taxes" (served June 15, 1990), at 7 n.3 (8th Circuit Joint Appendix at 59).

App. A18. The district court also denied Petitioners' claim that a refund process designed by the court itself, rather than application of the state statute, was required to afford Petitioners due process, under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). Instead, the district court held that *McKesson* provides strong support for application of Mo. Rev. Stat. § 139.031 in this case. Pet. App. A15-A17.

The Court of Appeals affirmed these rulings. It also turned back, as contrary to longstanding precedents of this Court, Petitioners' claim that they were denied due process because they had inadequate notice of an obligation to comply with the Missouri tax protest statute. Pet. App. A9.

With respect to 1988-89 KCMSD property taxes, the Court of Appeals sustained the district court's denial of any refund to Petitioners. Both courts refused to accept Petitioners' claims regarding the purpose and effect of the lower courts' prior orders. Likewise, they rejected Petitioners' interpretations of the actions of the KCMSD Board of Education. The lower courts also found baseless Petitioners' claim that *Jenkins II* establishes their entitlement to a full refund. Pet. App. A9-A10, A19-A21.

Petitioners continue to rely on a variety of factual contentions that were rejected by the lower courts. First, Petitioners assert that the KCMSD Board premised its resolution adopting a 1988-89 tax levy on the district court's 1987 direct tax increase order, which was later held invalid. Petitioners argue that this conclusion follows from the wording of tax levy resolutions adopted by the Board, and also from the date the Board adopted a $4.00 rate for 1988-89: October 11, 1988, three days before the Eighth Circuit's mandate issued. Pet. 5, 6, 18-22. Both lower courts held otherwise, concluding that KCMSD acted in accordance with the modified procedures first announced on August 19, 1988 by the Court of Appeals. Pet. App. A10.

Petitioners also maintain that the Court of Appeals' modified procedures were not satisfied for 1988-89 because the district court allegedly failed to approve a $4.00 levy for that year. Pet. 6. Once again, the lower courts reached directly contrary findings regarding the intent and effect of their own orders. Specifically, they held that the $4.00 levy rate approved by KCMSD on October 12, 1988 was the same rate the district court "obviously" had approved in 1987, and also " 'tacitly approved as reasonable' " in its January 3, 1989 order. Pet. App. A10. Furthermore, the Eighth Circuit has declared that it "fully effectuated" its "decision as to future taxing procedures . . . by issuance of its mandate" on October 14, 1988. *Id.* Thus, the modified procedures were in effect at the end of 1988, "by the time the billing and collection took place" for 1988-89 taxes, and accordingly, the taxes for that year " 'were collected lawfully.' " *Id.*

Icelean Clark, *et al.*, filed their Petition for Certiorari following the Court of Appeals' unanimous affirmance of the decision of the district court. Petitioners declined to seek en banc review in the Court of Appeals.

REASONS FOR DENYING THE WRIT

Petitioners present this Court with no basis to reconsider the rulings of the lower courts on remand of *Jenkins II*. Granting certiorari in this instance would simply require the Court to review findings of fact below, to reevaluate the lower courts' analysis of Missouri tax law, and to scrutinize the application of clear principles of federal law to the unique circumstances of this complex desegregation case.

The supposed importance of this case derives not from any conflicting decisions in the circuit court of appeals, or even from the possibility that its resolution will afford guidance for the future. Rather, its alleged significance derives almost entirely from the unprecedented nature of the judicial tax increase that led to these refund requests.

Yet the clarity of *Jenkins II*'s unanimous holding that a direct judicial tax increase was unlawful means that the issues Petitioners ask the Court to address likely will never arise again. Moreover, Petitioners have demonstrated no error in the lower courts' ruling much less an important question of federal law. Thus, no "special and important reasons" for review are posed by the Petition for Certiorari, Sup. Ct. R. 10.1, and it should be denied.

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE LOWER COURTS' DECISION TO LIMIT REFUNDS OF 1987-88 KCMSD PROPERTY TAXES TO TAXPAYERS WHO PAID UNDER PROTEST

Instead of showing "special and important reasons" justifying review of the lower courts' decisions limiting refunds of 1987-88 KCMSD property taxes, Sup. Ct. R. 10.1, Petitioners have presented theoretical alternative rulings on a variety of factual and legal issues. The Petition fails to demonstrate any adequate grounds for the Court to explore these questions.

The lower courts both held that provisions of a Missouri statute governing tax protests and refunds, Mo. Rev. Stat. § 139.031, apply to this case. The statute provides, in pertinent part:

> Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the director of revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based. . . .

Mo. Rev. Stat. § 139.031.1 (1987 Supp.) (amended 1989).[8] Based on a careful review of the text of the

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[8] Mo. Rev. Stat. § 139.031.2 requires public officials to maintain protested funds in escrow and sets forth procedures for taxpayers

statute, of State court decisions interpreting it, and of the unique circumstances of this case, the lower courts held that only those KCMSD taxpayers that protested their 1987-88 property tax increase were entitled to a refund. Pet. App. A10-A11, A18.

Petitioners urge this Court to reconsider several aspects of the lower courts' analysis of Section 139.031. In particular, they contest determinations that the statute applies, on its face, to "any taxes," including a property tax levy ordered by a federal court, rather than only to certain taxes levied by state authorities. Pet. 12; Pet. App. A7. Petitioners also dispute rulings below that a broad reading of the statute is supported by state court decisions applying Section 139.031 to "a variety of taxes." Pet. App. A7; Pet. 12. Third, Petitioners challenge the lower court's finding that determining whether a tax is covered by Section 139.031 is more complex than merely identifying "the origin of the levy," and requires an examination of such factors as how and by which authorities the tax is billed, to which authorities it is paid, which authorities benefit from revenues collected, and so on. Pet. App. A7; Pet. 13.[9] Finally, Petitioners dispute the lower courts' judgment that in light of the facts at issue, Section 139.031 applies to their refund requests.

Surely these issues of Missouri tax law are of insufficient consequence to warrant this Court's review. Furthermore, in some instances—such as the question whether "the federal trial court was the de facto taxing authority," Pet. 10—the matters raised by Petitioners are so fact-bound as to be inappropriate for this Court's docket.

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to initiate an action in state court seeking recovery of protested funds. *See* Pet. 11.

[9] Petitioners err in accusing the Court of Appeals of wholly discounting the importance of the "origin of the levy." Pet. 13. The Eighth Circuit simply suggested that the origin of the tax was only one relevant factor when considering the possible application of Section 139.031 to the court-ordered tax increase. Pet. App. A7.

It would be equally inappropriate for the Court to grant certiorari to review any of Petitioners' arguments against a partial 1987-88 refund that are based on federal law. The principal federal question on which Petitioners seek review is whether the district court violated principles of due process by relying on Section 139.031 and failing to devise a refund procedure on its own.

Both of the lower courts correctly ruled that this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), squarely supports their application of the Missouri tax protest statute, consistent with principles of due process. Pet. App. A7-A9. The Court of Appeals noted, in particular, that "*McKesson* . . . specifically approves the protest and escrow procedures that are at the heart of section 139.031." *Id.* A9.

McKesson held unconstitutional the State of Florida's refusal to provide certain taxpayers *any* opportunity for a refund of taxes they paid which were later held unlawful. This Court declared that a state may impose limits on taxpayers' rights to obtain a tax refund, after payment of taxes assessed, so long as those limits do not deny taxpayers "a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." Pet. App. A8 (*citing* 496 U.S. at 22, 110 S. Ct. at 2242). As both lower courts in this case recognized, *see* Pet. App. A8, A16-A17, *McKesson* establishes that reasonable limits on tax refunds serve important public goals. Such "procedural protections," the *McKesson* Court declared, "secure [a] State's interest in stable fiscal planning," and guard a State and its citizens "against any disruptive effects of a tax scheme's invalidation." 496 U.S. at 45-47, 50.

In describing specific limits on tax refunds that are consistent with due process, this Court said: "The State might for example provide by statute that refunds will be available only to those taxpayers paying under protest

. . . and/or place challenged tax payments into an escrow account." Pet. App. A8-A9 (*citing* 496 U.S. at 44-45, 110 S. Ct. 2254-55).[10] Under *McKesson*, the kind of mechanism provided by Section 139.031 clearly comports with due process. In light of this settled point of law, there exists no significant issue of federal law for the Court to address.

Nevertheless, Petitioners urge this Court to grant review to consider their assertion that "[t]he clear import of *McKesson* is that where a federal court unlawfully assumes the authority to levy and collect a tax, *the federal court* must provide taxpayers with notice and a meaningful opportunity to protest the tax and protect their right to a refund in order to satisfy [due process]." Pet. 16. For a host of reasons, this argument is far-fetched, and an unworthy basis for granting certiorari. First, because the court-ordered tax in this case was *sui generis*, Pet. 8, even if Petitioners had a plausible legal argument, there would be no significant value in agreeing to consider it. That is, no purpose would be served by establishing a precedent regarding a kind of taxation that is virtually certain never to recur, much less to require federal courts to adjudicate refund claims. Second, even if Petitioners are correct that the district court itself was required to adopt tax refund procedures that satisfy due process, then under *McKesson*, it did just that in relying on Section 139.031.[11]

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[10] In Section 139.031, Missouri has codified the traditional common law rule that protest at the time of payment is a condition precedent to recovery of an unlawful tax. *See George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 375 (1933). Several cases Petitioners cite for a contrary proposition, that taxpayers "forced to pay an unlawful tax against their will" are presumptively "entitled to a full refund," Pet. 9-10, simply do not establish any such rule. In fact, none of Petitioners' purported authorities say anything about tax refunds, and only one concerns taxes at all.

[11] In an effort to create a federal legal issue where none exits, Petitioners grossly distort *McKesson*, suggesting that it bars meas-

A close reading of the Petition suggests that Petitioners seek a ruling by this Court that because the district court was the author of the unlawful tax increase, it was constitutionally prohibited from relying on Section 139.031, and was required in order to satisfy due process to devise a wholly separate tax refund mechanism of its own (and presumably to establish a court-run bureaucracy to administer it). Petitioners seek certiorari in a quest for a decision that would undermine both *McKesson*, which approved measures such as Section 139.031, as well as the federal state comity principles announced in *Jenkins II*. Surely leaving undisturbed the lower court's reliance on state tax law and administrative practice would be more consistent with notions of federal judicial restraint—which explain this Court's rejection of a judicial tax increase—than would a ruling that the district court should have ignored state law on tax refund procedures.

In the past, "[c]onsiderations of federal state comity" have led the Court not to intervene in situations such as this; that is, when the Court has "held state taxes unconstitutional . . . it has [made a] practice to abstain from deciding the remedial effects of such a holding." *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 176 (1990).

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ures such as Section 139.031, affording "remedies falling short of complete refund," in the event of a tax that "was beyond the state's power to impose," and that it sanctions such measures only in cases involving taxes that are "discriminatory." Pet. 16. Rather, *McKesson* simply reaffirmed that government violates due process whenever it does " 'not incur *any* obligation to pay . . . back' " unlawfully collected taxes. 496 U.S. at 39 (emphasis added) (citation omitted). Consistent with this principle, Florida was free to adopt "various procedural requirements on actions for post deprivation relief," such as those imposed by Section 139.031. *Id.* at 44. Because Section 139.031 facilitates refunds for those who pay under protest, however, Petitioners are flatly wrong in criticizing the lower courts for permitting the collection of a tax without recognizing "any obligation to require repayment once it is found unlawful." Pet. 17.

The Court's approach also indicates the district court acted properly in this case by deferring to state law, rather than asserting "itself in th[e] complex area of state tax structures." *Id.* (citation omitted).

Petitioners acknowledge that the due process analysis they ask this Court to undertake is distinctly fact-based. Respondents agree with Petitioners that "[w]hat constitutes a 'meaningful' opportunity to be heard is flexible, depending on the procedural protections demanded by particular situations." Pet. 15 (*citing, inter alia, Zinermon v. Burch*, 494 U.S. 113, 127-28 (1990); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). This observation simply confirms that it is proper to leave to the lower courts the question whether Section 139.031 satisfies due process in this instance. Granting certiorari would divert the Court from its role as a final arbiter of vital federal legal issues, and would simply cast the Court in the role of a fact-finder of last resort.

Finally, there is no merit whatever to Petitioners' request that the Court take this case in order to consider whether they received constitutionally adequate notice of their obligation to comply with Mo. Rev. Stat. § 139.031. That question poses no substantial federal legal issue. Rather, the Court of Appeals was plainly correct in holding, based on principles this Court established over a half century ago, that non-protesting KCMSD taxpayers must be held legally responsible for knowing about statutory remedies at their disposal. Pet. App. A9 (*citing, inter alia, Texaco, Inc. v. Short*, 454 U.S. 516, 532 n.25 (1982); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925) ("[a]ll persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them")).

Unaccountably, Petitioners ignore this settled law. Instead they rest on a bare emotional appeal that this Court's intervention is needed to restore losses incurred by unwitting taxpayers. *See* Pet. 8-9, 17. Petitioners fail to demonstrate that this case is fundamentally different

from any other in which taxpayers have failed to use remedies afforded to them. Petitioners also make the frivolous assertion that Section 139.031 provides "no safeguards" for "KCMSD taxpayers who have never been parties to the desegregation litigation." Pet. 16. This charge fails to acknowledge that all such individuals and corporations receive KCMSD property tax notices, that btweeen 9,000 and 10,000 KCMSD taxpayers invoked Section 139.031 in 1987-88 and 1988-89, and moreover, that Petitioners' counsel themselves worked to publicize the availability of the state tax protest remedy. *See supra* at 6-7.

II. GRANTING CERTIORARI TO REVIEW THE DENIAL OF KCMSD PROPERTY TAX REFUNDS FOR 1988-89 WOULD BE INCONSISTENT WITH THIS COURT'S TRADITIONAL DEFERENCE TO FINDINGS OF FACT BY LOWER COURTS, AND WITH THE COURT'S BROAD REMAND ORDER

Petitioners ask this Court to review numerous findings of fact by the lower courts in connection with the denial of KCMSD property tax refunds for 1988-89. These findings concern the nature of the actions of the KCMSD School Board, as well as those of the district court and the Court of Appeals. The Petition fails to justify such a request for the Court to depart from its role as a "court of law, . . . , rather than a court for correction of errors in fact-finding." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). In fact, *Jenkins II* gave the lower courts a broad assignment on remand, thus recognizing the Court's traditional function and establishing the lower courts' primary responsibility for handling such questions as tax refunds.

Both lower courts made fact findings contrary to Petitioners' assertion that the 1988-89 levy increase was not "[t]imely [a]dopted [b]y [t]he Kansas City School Board." Pet. 18. They held "[t]he Board itself set the 1988 levy on October 11, 1988," Pet. App. A10, well be-

fore, as Petitioners put it, "the 1988[-89] levy was set, billed and paid." Pet. 19. As the Eighth Circuit observed, "there was nothing to prevent the board from taking action" in accordance with the Court of Appeals' August 19, 1988 decision prior to the issuance of the Court of Appeals' mandate on October 14, 1988. Pet. App. A10.

Petitioners also wish to relitigate factual issues regarding KCMSD's intentions that the lower courts have resolved in respondents' favor. First, Petitioners ask this Court to consider their claim that the KCMSD Board adopted a $4.00 levy for 1988-89, on October 11, 1988—based on the authority of the district court's 1987 tax increase order which this Court reversed—rather than on the authority of the Court of Appeals' August 19, 1988 modification of that order which this Court sustained. Pet. 21-23. In large part, Petitioners' claim is premised on the fact that the Court of Appeals' mandate issued three days after the KCMSD Board's October 11, 1988 resolution. *Id.* However, the lower courts rejected this argument because it failed to take full account of the date the Court of Appeals' opinion originally issued and the Board's intent to rely thereon.[12]

Petitioners also argue that references to the district court's September 15, 1987 order, in the KCMSD Board's resolutions of September 13 and October 11, 1988, demonstrate KCMSD's reliance on a judicial tax increase this Court later reversed. Pet. 21-22. But Petitioners already have presented these same factual arguments, premised on the same evidence, to both lower courts, with no success. *See* Pet. App. A6, A10.[13] The district court and the Court

[12] This simple finding regarding the chronology of events in this case fully refutes Petitioners' intemperate assertion that the lower courts must have used "telepath[y]," Pet. 21, in determining, prior to October 14, 1988, that KCMSD (and the district court) "understood who must set the levy for 1988." Pet. App. A20-A21; *see id.* A10.

[13] Likewise, Petitioners argue that a reference to the August 19, 1988 Eighth Circuit order in a KCMSD Board resolution of

of Appeals each held that KCMSD adopted a levy for 1988-89 based on the authority of the Eighth Circuit's August 19, 1988 opinion, which modified the tax increase procedures established by the district court, but did not disturb its findings regarding the reasonableness of the $4.00 rate. *Id.* In short, each of the factual premises of Petitioners' interpretations of the actions of the KCMSD Board has been rejected by both lower courts. Pet. App. 10.[14]

This Court has often declared that because it is a court of law, it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *quoting Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).[15] Because Petitioners have failed to make such

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August 22, 1989, both establishes KCMSD's reliance in that year on the Court of Appeals' modified procedures, and corroborates KCMSD's reliance on the district court's 1987 order in prior years. Pet. 22-23. These factual assertions also were presented to and dismissed by the lower courts.

[14] The lower courts have not bothered to address another of the supposed "inconsistencies" identified by Petitioners. The KCMSD Board's simultaneous support for two different rates as "reasonable and necessary" in the Fall of 1988, *see* Pet. 21, plainly reflects the Board's attempt to argue in the alternative for a rate ($4.00) that already had been found to be reasonable and higher rate ($4.23) that the Board hoped the district court would find to be reasonable. Once the KCMSD Board decided time had expired to seek the higher rate for 1988-89, the Board set the lower rate for 1988-89, pursuant to the Eighth Circuit's modified procedures, and supported the higher rate only for 1989-90. See Pet. App. A4-A5, A9-A10. Petitioners' claim that this amounts to wanting to "have it both ways," Pet. 21, is meritless.

[15] *See, also, e.g., Tiffany Arts, Inc. v. United States*, 469 U.S. 310, 317-18 n.5 (1985) (noting "reluctance to disturb findings of fact concurred in by two lower courts"); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984) (Court accords "great weight to a finding of fact which has been made by a district court and approved

an "exceptional showing of error" with respect to the "concurrent findings of fact" discussed above, a decision to review the lower courts' rulings on these issues would be inconsistent with this Court's "traditional deference to the 'two-courts rule.'" *United States v. Ceccolini*, 435 U.S. 268, 273 (1978) (citation omitted).

Petitioners also propose that this Court sift through the lower courts' conclusions regarding the purpose and effect of several of their own rulings. This task also would put the Court in the inappropriate position of the finder of fact.

One of the key assertions in the Petition is that the Court of Appeals did not put into effect its modified procedures, first announced August 19, 1988, until after the billing and collection of the 1988-89 KCMSD property tax increase. Pet. 22. The principal assumption underlying this contention is that the Court of Appeals intended that the district court issue a separate order explicitly approving any 1988-89 levy rate chosen by KCMSD, including the $4.00 rate the district court previously had approved (as reasonable and necessary) in fact-findings the Eighth Circuit had declined to question. Petitioners also argue that the district court never issued such an order "before the 1988[-89] taxes were levied and paid"; in short, "KCMSD could not alone set this levy; the District Court had to approve it." Pet. 21.

This string of interpretations conflicts with the lower courts' own conclusions regarding the purposes of their orders. In particular, the Court of Appeals has stated that its modified procedures were "fully effectuated [in October 1988] by issuance of its mandate," and that as a result, the 1988-89 "taxes were collected lawfully" pursuant to those procedures. Pet. App. A10. Thus, the Eighth Circuit has made clear that in its view, no further

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by a court of appeals"); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (same).

steps were required by the district court in the Fall of 1988. With specific regard to district court approval of the 1988-89 levy rate, the Eighth Circuit has stated that the district court already "obviously" had approved the $4.00 rate as reasonable in 1987, and "tacitly" approved the same rate again in January 1989. Pet. App. A10. The district court also has ruled that under the circumstances presented in 1988, it was unnecessary to issue a separate order—prior to tax billing and collection—approving the $4.00 levy rate adopted by the KCMSD Board for 1988-89: "[T]here is no question that the KCMSD followed the modified procedure approved by the Eighth Circuit and affirmed by the Supreme Court. The proper focus is on what action the KCMSD took." Pet. App. A19. Respondents respectfully submit that this Court should defer to the lower courts' own judgments regarding implementation of their prior orders in light of the particular facts presented in 1988-89.

This Court is asked to grant certiorari, with regard to the denial of refunds for 1988-89 KCMSD property taxes, on the basis of one other claim: that *Jenkins II* contains a "clear interpretation of the effective date for the [Eighth Circuit's] modified tax scheme." Pet. 23. Petitioners' assertion is belied by the fact that the *Jenkins II* Court never addressed this issue directly, but only discussed it in a footnote, whose apparent purpose was to establish that "[t]he Court of Appeals' discussion of the procedures to be used in the future was not dictum." 495 U.S. at 52 n.18. This conclusion served as the predicate for Section IV of the Court's opinion, in which the Court affirmed the modified procedures.

Although this Court was surely "careful" in describing events that followed the Court of Appeals' decision, Petitioners unfairly and inaccurately suggest that the Court had at its disposal all it needed to compile a thorough "chronology" of the process of setting a property tax levy for 1988-89. Pet. 20. The record before this Court in

Jenkins II did *not* contain important materials bearing on the question of the effective date of the Court of Appeals' modified procedures. These include the KCMSD Board tax levy resolutions of September and October 1988, and the Board's Fall 1988 tax levy motion in the district court, all of which indicated the Board's intentions and actions to "itself set the levy" for 1988-89, at $4.00, pursuant to the modified procedures. Pet. App. A10.[16] These relevant evidentiary materials further demonstrated that the Eighth Circuit's modified procedures were "fully effectuated in 1988-89." Pet. App. A10.

Because this Court had before it important federal legal issues in *Jenkins II*, it issued a broad remand order, and did not prejudge the outcome of subsequent proceedings in the lower courts to undo the unlawful judicial tax increase. Moreover, because this Court could rely on the Eighth Circuit to interpret its own opinion—and if necessary, to summon a more complete evidentiary record—on the question of the effective date of its modified procedures, the Court had no need to issue, and flatly did not issue the "clear interpretation" which Petitioners have imagined.[17] As the district court stated below, this Court "avoided dictating the precise consequences of its ruling . . . that only tax increases imposed pursuant to the Eighth Circuit's revised procedures were valid," and di-

[16] When the KCMSD Board set the 1988-89 levy, within the limits previously established by the district court, it became unnecessary for the district court to reverse that portion of its 1987 order directly imposing such a levy for 1988-89. Thus, the documents not in the record in *Jenkins II* would have further informed the Court's observation—which is stated without an explanation—that "on January 3, 1989[, t]he District Court took no action to reverse its tax increase through fiscal year 1988-89." 495 U.S. at 53 n.18.

[17] In particular, there is no merit to Petitioners' suggestion, rejected by the lower courts, that the Court set the effective date of the modified procedures at fiscal year 1989-90 by placing an "s" at the end of the word "years" in the third sentence of Footnote 18. *See* Pet. 20; 495 U.S. at 53 n.18.

rected "the Eighth Circuit to determine whether the essential elements of the revised procedures were followed in setting the KCMSD property tax levy" for any of the fiscal years prior to this Court's decision. Pet. App. A20. The lower courts acted properly in accordance with these guidelines.

Petitioners' assertion that the lower courts misinterpreted this Court's legal and factual rulings in *Jenkins II* is unfounded. Thus, it provides a wholly inadequate basis for granting the Petition of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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September 11, 1992